87-1271

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, PACIFIC MARITIME REGION, A LABOR ORGANIZATION; KURT PETRICH, ROBERT W. SEIDMAN, *et al.*,

Petitioners,

v.

ELEANOR ANDREWS, COMMISSIONER OF ADMINISTRATION OF THE STATE OF ALASKA; RICHARD J. KNAPP, COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES OF THE STATE OF ALASKA; MARTIN NUSBAUM, DIRECTOR OF ADMINISTRATIVE SUPPORT OF THE DIVISION OF MARINE HIGHWAY SYSTEMS OF THE STATE OF ALASKA; JOHN DOES II-X, OFFICERS OF THE STATE OF ALASKA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE QUESTIONS PRESENTED FOR REVIEW

In 1979, the State of Alaska applied Alaska Statute 23.40.210 to its labor agreements with several maritime unions. The statute had been amended in 1977 to require that every labor agreement between any public employer in the state of Alaska and any labor organization representing any public employees (regardless of their place of employment) include a wage differential between the salaries paid to employees residing in the state and those paid to employees residing outside of the state. The statute also required that the salaries of all such nonresident employees remain unchanged until the wage differential was achieved.

As a result of the statute's implementation, Alaska froze the wages of nonresident Alaskans who worked on the Alaska Marine Highway System (AMHS) from July 1979 through at least April, 1983. Resident Alaskan AMHS employees, however, were permitted by statute and did in fact receive substantial wage increases during that same period.

The questions presented for review are whether Alaska's state-wide salary freeze for nonresident public employees or the state-wide salary differential between resident and nonresident public employees:

1. Is in violation of the Privileges and Immunities Clause of the United States Constitution because it unreasonably discriminates in favor of its own residents against the residents of other states who travel there for the purpose of employment;

2. Violates the Commerce Clause of the United States Constitution because it unduly burdens and discriminates against the interstate commerce of persons pursuing their employment with every town, city, borough, quasi-public corporation, housing authority or other public employer in the state of Alaska; or

3. Violates the U.S. constitutionally protected interest in free interstate migration (the right to travel) because it deters migration from the state, because its primary objective is to impede travel from the state, or because it uses a classification which penalizes the right to travel to another state for residence.

PARTIES TO THE PROCEEDING

Petitioners

International Organization of Masters, Mates & Pilots, Pacific Maritime Region, a labor organization; Kurt K. Petrich, Robert W. Seidman, John W. S. Lam, William P. Turner, Sandra Jenson, Grant R. Webber, Ronald P. Tyrell, Mike McRoberts, David Roberts, Robert E. Smith, Frank R. Ewing, Pierre L. Rutledge, Lawrence E. Markham, Arlene G. Sheets, Paul K. Judd, David Lisle, Patrick Kangas, William Petrich, Clement Wischinski, Donald E. Besse, David Kutz, Robert Chamberlain, Victor Freise, Wallace Blackwell, Billie Alsup, Jr., Charles H. Knight.

Respondents

Eleanor Andrews, Commissioner of Administration of the State of Alaska; Richard J. Knapp, Commissioner of the Department of Transportation and Public Facilites of the State of Alaska; Martin Nusbaum, Director of Administrative Support of the Division of Marine Highway Systems of the State of Alaska; John Does II-X, officers of the State of Alaska.

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OF THE STATE OF ALASKA;
MARTIN NUSBAUM,
DIRECTOR OF ADMINISTRATIVE SUPPORT
OF THE DIVISION OF MARINE HIGHWAY SYSTEMS
OF THE STATE OF ALASKA;
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States: Petitioners, International Organization of Masters, Mates & Pilots, Pacific Maritime Region, and Kurt Petrich, Robert Seidman, *et al.* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 29, 1987.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 831 F.2d 843 (1987) and is attached in Appendix A to this Petition. The opinion of the United States District Court for the District of Alaska is reported at 626 F. Supp. 1271 (1986) and is printed in Appendix B to this Petition. The order of the United States District Court for the District of Alaska is reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves Article IV, Section 2, Clause 1 of the Constitution of the United States which provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This case also involves Article 1, Section 8, Clause 3 of the Constitution of the United States which provides in relevant part:

> Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.

Likewise, this case involves two Alaska statutes which provide as follows:

> AS 23.40.210. *Agreement.* Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may

include a term for which it will remain in effect, not to exceed three years. *The agreement shall include a pay plan designed to provide for a cost of living differential between the salaries paid employees residing in the State and employees residing outside the State. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the State shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the State reflects the difference between the cost of living in Alaska and living in Seattle, Washington.* The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the Labor Relations Agency. (Emphasis supplied).

AS 23.40.250. *Definitions.* In AS 23.40.070 — 23.40.260, unless the context otherwise requires,

* * *

"public employer" means the state or a political subdivision of the state, including without limitation, a town, city, borough, district, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees.

STATEMENT OF THE CASE

This case was decided by the District Court for Alaska following cross motions for summary judgment and with the benefit of the parties' joint Statement of Facts Not In Dispute, reproduced in Appendix D to this Petition.

Material Facts

The Alaska Marine Highway System (AMHS), a division of Alaska's Department of Transportation and Public Facilities, operates a fleet of public ferry vessels in interstate and

international waters between ports in Alaska and Seattle, Washington. The AMHS vessels regularly call at the Port of Seattle for the pickup and discharge of passengers, mail, and personal and commercial motor vehicles, including trailers.

Alaskan and non-Alaskan residents work aboard the AMHS vessels which operate among the southwest Alaskan ports (Aleutian run) and the vessels which operate among the southeast Alaskan ports, Seattle and Canada (southeast run). Employees on the southeast run work a schedule of at least one week on duty followed by at least one week off duty. On the Aleutian run, employees may work on the vessels for a full month or even several months at a time.

During the off-peak season, a number of the system's vessels are moored in Seattle. While in Seattle, employees of the system perform maintenance work on the vessels and live on board.

In 1977 Alaska Statute 23.40.210 was amended to require a wage differential and a wage freeze for all nonresident Alaskan employees who are employed by either the state or any political subdivision of the state.

It is this wage freeze and the wage differential which adversely impacts only nonresident Alaskan employees which is at issue in this case.

Petitioners either represent or are employees who work on the AMHS. The International Organization of Masters, Mates & Pilots, Pacific Maritime Region (IOMM&P), represents approximately 65-70 licensed deck officers employed by the system. The other 26 petitioners are members of the Inland-boatmen's Union of the Pacific (IBU).

In 1980, 34 of the IOMM&P's 65 members who were employed by the State of Alaska were nonresidents of Alaska. On April 1, 1983, only 24 of 69 members were nonresidents.

Approximately one-half of the IOMM&P nonresident employees reside in the Seattle area. The other one-half of the IOMM&P nonresident employees who work for the AMHS reside elsewhere in the state of Washington or, as one does, in the state of California, or, as one did, in the state of Wisconsin.

This amendment to AS 23.40.210 was introduced in the Alaska legislature as House Bill No. 203. A letter of intent which accompanied the bill and which was signed by the chair of the House Finance Committee stated, in part:

> The purpose of the bill is to encourage employees of the Marine Highway System to live in Alaska.

The amendment to AS 23.40.210 was in response to the Alaska Supreme Court's invalidation of a durational residency requirement in 1973 (*State v. Wylie*, 516 P.2d 142 (Alaska, 1973)) for it had been the policy of the State of Alaska to employ Alaskan residents on the ferries as much as possible. This policy continues and is reflected in Alaska's labor agreements with the IOMM&P and the IBU which provide for the preferential hire of Alaska residents.

Because of the mandate of AS 23.40.210 that salaries paid to employees residing outside the state of Alaska remain unchanged until the wage differential between resident and nonresident public employees is achieved, the wages of nonresident Alaskans who worked on the AMHS were frozen from July 1979 through at least April 1983. During this period of time, however, resident Alaskan employees received substantial wage increases.

Between July 1979 and January 1983, the cost of living in the Seattle-Everett area increased 37%. However, during that period of time IOMM&P nonresident Alaskan employees of the AMHS did not receive any wage increase while Alaskan resident employee wages increased approximately 11-13% which represented as much as $608 per month.

During that same period of time, IBU nonresident employees of the AMHS did not receive any wage increases until the wages of their IBU Alaskan resident employee counterparts had increased by more than 22½%.

This statutory scheme resulted in situations where a subordinate resident employee earned a higher wage than his or her nonresident supervisor. Furthermore, the pay differentiation between residents and nonresidents has caused dissension and some tension between the two groups of employees.

Basis for Federal Jurisdiction In District Court

The basis for the Federal jurisdiction at the trial court level was 28 U.S.C. §§ 1331, 1333 and 1343 and 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

This case challenges state legislation which requires that all collective bargaining agreements with all public employees of the state and its political subdivisions must provide higher compensation for labor performed by state residents than the identical labor performed by nonresidents, and that the wages paid to nonresidents must be frozen until the state's legislated wage disparity is fully achieved.

There is no issue of whether or not discrimination exists or is intended. On its face the statute expressly compels discriminatory treatment between residents and nonresidents in wages. Its legislative history also clearly reflects its intent to discriminate against nonresidents. The discrimination results in a wage disparity between resident and nonresident employees of 22½%.

What reason does the state assert for the unequal treatment? The legislative history avows that its purpose is to encourage state residency.

What method does the state select to encourage state residency? It enacts a statute which mandates a wage disparity between state residents and nonresidents doing the same job with the same seniority; it imposes a wage freeze on the wages of nonresidents for many years until the wage disparity is attained. It further offers public employees a "choice" — either move to or remain a resident of the state of Alaska, or, with the certain impact of inflation, suffer a decrease in the purchasing power of your wages.

There is no issue of whether or not the difference in treatment is fair. In one of its own affidavits in support of its motion for Summary Judgment, the State asserts:

> It is the method of computing this additional pay that seems unfair, since the non-resident can receive no increase until the resident has reached a pre-determined level.
>
> Also, all wages "in-grade" should be the same for everyone, with a separate allowance to residents to account for any cost-of-living differential. This would eliminate the case where a subordinate resident receives a higher base salary than his non-resident supervisor.

There is no issue of whether or not free interstate migration has been inhibited. David Lisle, one of the petitioners, swore by affidavit:

> Because of the fact that my residence assures me a higher wage, I am hesitant about moving from Alaska to another state. I would like to live elsewhere, but I have avoided moving in large part due to the wage differential required by statute and the collective bargaining agreement.

Likewise, Myron Brixner who is a member of the IOMM&P, averred by affidavit:

> . . .the single most important factor in the increase of bargaining unit members residing within the State of Alaska is the wage differential which has resulted from

> AS 23.40.210. It is clear to me that the statute has had its intended effect and has coerced many non-Alaskan residents into moving into the State of Alaska, and has influenced Alaskan residents to remain within the State of Alaska, rather than moving to Washington or some other state.

There is little room to doubt that Alaska's legislation impedes rather than secures and perpetuates, mutual friendship and intercourse among the employees of the different states. Dennis LePonis in an affidavit in support of the state's motion for Summary Judgment noted that the method of differentiating between residents and nonresidents has caused dissension between the two groups of employees. Dale Whitesides, who also submitted an affidavit in support of the state's motion for Summary Judgment averred that since the present method of computing the cost of living pay differential has prevented nonresident marine system employees from receiving salary increases, there is now some tension between the two groups.

In the Statement of Facts Not In Dispute, attached at Appendix D to this Petition, the parties stipulated at paragraph 40:

> The differentiation in pay between Alaska resident employees and nonresident employees has caused dissension and some tension between the two groups of employees.

The only issue for resolution by this Court is whether the unfairness and discrimination practiced upon nonresidents is constitutionally justifiable.

This case presents a singular opportunity for the resolution of this issue upon three distinct constitutional grounds; the Privileges and Immunities Clause, the Commerce Clause and the right to travel.

After a considerable period of quiescence, this Court, during the last 15 years, has increasingly highlighted the breadth of the freedoms guaranteed by these three constitutional rights.

Some of the recent decisions of this Court in the evolution of these doctrines are referenced below:

Re: Privileges and Immunities Clause:

Austin v. New Hampshire, 420 U.S. 656, 95 S. Ct. 1191, 43 L.Ed.2d 530 (1975) struck down the New Hampshire Commuters Income Tax. Its "unilateral imposition of a disadvantage upon nonresidents" (420 U.S. at 667, n. 12) could not be "squared with the underlying policy of comity" (420 U.S. at 666) to which this Clause commits the Court. The Court reached this conclusion even though the ultimate burden which the tax imposed on nonresidents was not more onerous in effect because their total tax liability remained unchanged once the tax credit from their own state of residence was taken into account.

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 98 S. Ct. 1852, 56 L.Ed.2d 354 (1978) upheld Montana statutes which imposed higher licensing fees on nonresident elk recreational hunters but noted that its result could be different if a statute "interferes with a nonresident's right to pursue a livelihood in a State other than his own." 436 U.S. at 386.

Hicklin v. Orbeck, 437 U.S. 518, 98 S. Ct. 2482, 57 L.Ed.2d 397 (1978) struck down the "Alaska Hire" statute and restated the constitutional right of a person "to travel to another state for purposes of employment free from discriminatory restrictions in favor of State residents imposed by the other State." 437 U.S. at 525. Even the state's ownership of a resource would not empower the state to do anything it wanted in connection with that resource. 437 U.S. at 528.

United Building and Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L.Ed 2d 249 (1984) reversed a decision of the New Jersey Supreme Court and remanded it for reconsideration of the Privileges and Immunities Clause. The issue on remand was whether an ordinance requiring at least 40% of the employees on city construction projects to be Camden residents had substantial reasons for the difference in treatment, whether the degree of discrimination bore a close relationship to them and whether the nonresidents could be shown to constitute a peculiar source of evil at which the ordinance was aimed. 465 U.S. 222.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 105 S. Ct. 1272, 84 L.Ed.2d 205 (1985) concluded that New Hampshire's bar residency requirement violated the Privileges and Immunities Clause because the state had discriminated against nonresidents but had not shown that its reasons were substantial and that the difference in treatment bore a close or substantial relation to those reasons. 470 U.S. at 288.

In summary, this Court has been most vigilant in protecting those privileges and immunities which it has termed "basic," "essential" or "fundamental" relating to a nonresident doing business or earning a livelihood in a state on terms of substantial equality with the other state's residents.

Although the cases cited above have all been decided within the last 15 years, *Toomer v. Witsell*, 334 U.S. 385, 396, 68 S.Ct. 1157, 92 L.Ed. 1460 (1948) had previously stated:

> . . . it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

When a state discriminates against such a protected privilege as doing business on terms of substantial equality, the discrimination is justified only if a substantial reason is

offered for the difference in treatment, if the substantial reason is closely related to the degree of discrimination, and if the nonresidents constitute a peculiar source of evil at which the statute is aimed.

The mere fact that the nonresident employees are citizens of other states cannot constitute a "substantial reason" for discrimination. *Toomer v. Witsell*, 334 U.S. at 396; *Hicklin v. Orbeck*, 437 U.S. at 525. Furthermore, the nonresident employees do not constitute a peculiar source of evil. At paragraph 38 of the Statement of Facts Not in Dispute, the parties stipulated that the Alaska nonresident maritime union employees are not of themselves or as a group inherently injurious or harmful to the State of Alaska. In the courts below, the State contended that the "evil" at which the statute is directed is the higher cost of living in Alaska. However, the higher cost of living in Alaska is not a matter which is either caused by nonresidents or has nonresidents as its source.

In view of the preferential hiring provisions in the collective bargaining agreements of both the IBU and the IOMM&P and the freeze on wages of nonresidents while the cost of living in the Seattle-Everett area increased 37%, it is clear that Alaska chose to adopt a drastic discriminatory alternative, not a less restrictive means.

The issue is not one of the right to work for a governmental employer. Rather, the issue is the right of Alaska to legislate that its nonresident employees will have their wages frozen until a salary differential with the Alaska resident employees of 22½% is attained. Thus, the discrimination practiced upon the nonresident employees by AS 23.40.210 goes far beyond the degree of resident bias which Alaska can constitutionally support.

The issue which this case presents under the Privileges and Immunities Clause is whether a state can discriminate against its nonresident employees in matters of compensation for the reasons and to the degree which Alaska has done through AS 23.40.210.

Re: Commerce Clause:

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977) struck down a North Carolina law which had the effect of raising costs of Washington apple producers to make them more commensurate with costs of North Carolina producers irrespective of the "distinct market advantage" which the Washington producers had over the North Carolina producers. 432 U.S. at 352.

City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed.2d 475 (1978) struck down a New Jersey statute which attempted to "conserve" the natural resource of landfill areas within the state for disposal of waste generated within the state and which attempted to prohibit, on state health grounds, the importation of hazardous waste. This Court observed that state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. In striking down the New Jersey statute this Court found:

> . . . the State has overtly moved to slow down or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one instance and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. 437 U.S. at 628.

Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L.Ed.2d 250 (1979) reversed a state court criminal conviction for transporting for sale outside the state minnows which were procured within Oklahoma waters. Noting that the statute on its face discriminated against interstate commerce this Court stated that that facial discrimination in itself could be a "fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends'." 441 U.S. at 337, citing *City of Philadelphia v. New Jersey*, 437 U.S. at 626.

Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2271, 65 L.Ed.2d 244 (1980) upheld South Dakota's policy of confining sales of state-produced cement to state residents during periods of cement shortage. This Court noted that since "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants, [e]venhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U.S. at 439.

White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 103 S. Ct. 1042, 75 L.Ed.2d 1 (1983) upheld an executive order requiring all construction projects funded by city funds to be performed by a work force at least half of which were city residents. Inquiry under the Commerce Clause did not permit consideration of any burden on interstate commerce because the city was not regulating the market.

United Building and Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 104 S. Ct. 1020, 79 L.Ed 2d 249 (1984) explained that under Commerce Clause analysis state regulatory powers must give way before the superior authority of Congress to leave unregulated those matters involving interstate commerce. This Court stated:

> When the state acts *solely* as a market participant, no conflict between state regulation and federal regulatory authority can arise. 465 U.S. at 220 (Emphasis supplied)

Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S.____, 106 S. Ct. 1057, 89 L.Ed.2d 223 (1986) struck down a Wisconsin statute which prohibited state procurement agents from purchasing for three years any product known to be manufactured or sold by persons or firms which had violated the National Labor Relations Act three times within a five year period. In so doing, this Court rejected the contention of Wisconsin that it was imbued with a market participant exemption merely because it was spending its own funds in the marketplace. Instead, this Court agreed with the Court of Appeals that, by flatly prohibiting state purchases from repeat labor law violators, the state simply was not functioning as a private purchaser of services for, for all practical purposes, the state's debarment scheme was tantamount to regulation. 475 U.S. at____, 106 S. Ct. at 1062-1063, 89 L.Ed.2d at 230.

In summary, although *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299, 316, 13 L.Ed. 996 (1851) recognized that the "... regulation of the compensation [which pilots] may demand ... constitute regulations ... of commerce, within the just meaning of [The Commerce Clause] of the Constitution," the commerce which is really at issue in this case is the interstate movement of persons pursuing their employment.

As the preceding cases illustrate, the dormant Commerce Clause nearly always invalidates discrimination by the state against or unduly burdening interstate commerce particularly when the discriminatory measure constitutes economic protectionism which is virtually *per se* unconstitutional whether it is based upon either a discriminatory purpose or a discriminatory effect. *National Meat Association v. Deukmejian*, 743 F.2d 656, 659 (9th Cir. 1984), affirmed 469 U.S. 1100, 105 S.Ct. 768, 83 L.Ed. 2d 766 (1985).

The only notable exception to this rule is the market participant/market regulator distinction noted in the last four decisions of this Court which are listed above.

The 7th Circuit Court of Appeals in *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (1984) and this Court, as noted above in *United Building and Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. at 220 and *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. at____, 106 S. Ct. at 1062-1063, 89 L.Ed.2d at 230 have each held that discrimination by a state is not isolated from Commerce Clause analysis when a state is participating in the market if it is also engaged in regulating the market.

The legislation of matters which would otherwise be within the domain of the collective bargaining process such as Alaska has done by AS 23.40.210 is not a function of a private market participant and is therefore not a matter of evenhandedness which it can claim a right to share with private market participants. Furthermore, Alaska's intrusive interference into the collective bargaining process of every Alaskan city, town, board of regents, etc. is clearly an exercise of its regulatory authority.

This case therefore gives the Court an opportunity to further refine the market participant/market regulator distinction.

Re: Right to Travel:

Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972) struck down a Tennessee durational residency requirement for registering to vote because it impinged on the fundamental personal right to travel. This Court reiterated its view that actual deterrence to interstate travel need not be shown; instead any classification which served to penalize that right to travel (even if none of the litigants themselves had been deterred) would trigger review under the compelling-state-interest test. 405 U.S. 340-341.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L.Ed.2d 306 (1974) reversed the Arizona Supreme Court and struck down a durational residence requirement for indigents' nonemergency medical care at county expense because it penalized the right to travel.

Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309, 72 L.Ed.2d 672 (1982) struck down an Alaska income distribution scheme based on length of residence since statehood. Although holding that the statute violated the Equal Protection Clause, five Justices also concluded that it violated the right to travel, "or, more precisely, the federal interest in free interstate migration." 457 U.S. at 66.

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S. Ct. 2862, 86 L.Ed.2d 487 (1985) struck down as violating the Equal Protection Clause, a property tax exemption limited to Vietnam veterans residing in New Mexico before a specified date. In a footnote this Court also remarked that had the statute influenced certain veterans, having already moved to the state, to remain there to secure the tax benefit or had it encouraged certain veterans who had once resided in the state to return to the state, the selective enforcement would meet the same constitutional barrier faced by the distinction between past and newly-arrived residents which implicates the right to travel. 472 U.S. 619, n. 8.

Attorney General of New York v. Soto-Lopez, 476 U.S.____, 106 S. Ct. 2317, 90 L.Ed.2d 899 (1986) held unconstitutional an award of bonus points on a civil service exam which was limited to only those veterans who were residents of the state when they entered military service. The judgment of the Court (four Justices) concluded that unlike *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969), *Dunn, supra.* and *Memorial Hospital, supra.*, in which classifications denying the basic necessities of life or fundamental political rights constituted a penalty on the right to travel, the deprivation

of other significant benefits (not rising to the same level of importance as in *Shapiro*, *Dunn* and *Memorial Hospital*) could also operate to penalize the exercise of the right to migrate and therefore be unconstitutional. 476 U.S. at____, 106 S. Ct. at 2324, 90 L.Ed.2d at 909.

In summary, as the above cases illustrate, durational residence requirements are not the only classification which would violate the right to travel nor are they the only means of implicating the right to travel. A state law implicates the right to travel when it actually deters such travel or when impeding travel is its primary objective or when it uses any classification which serves to penalize the exercise of that right.

The intended purpose and effect of AS 23.40.210 is to create a classification between residents and nonresidents and to penalize the exercise of the constitutionally guaranteed right of migration, travel or egress to other states. This purpose and effect have been accomplished by legislating a substantial wage disparity between residents and nonresidents, by decreasing their wages if they choose to emigrate from Alaska, and by freezing their wages if they choose not to immigrate to Alaska.

This case would permit the Court to more definitely elucidate the contours of the federal interest in free interstate migration which were recently suggested but not definitively expressed in *Hooper, supra* and *Soto-Lopez, supra.*

Conflicts Between Circuits and With Applicable Decisions of This Court

Additionally, the Ninth Circuit's holdings herein on the Commerce Clause, and the issues raised by it *sua sponte*, conflict with decisions in the Third and Sixth Circuit Courts of Appeals.

There is also a conflict between the Ninth Circuit's Commerce Clause holdings herein and the principles previously enunciated by this Court regarding the origins and meanings of the Commerce Clause.

Jurisdiction under 28 U.S.C. § 1343 and the existence of a cause of action under 42 U.S.C. § 1983 for Commerce Clause based claims have been expressly authorized by the Third and Sixth Circuit Courts of Appeals. The decisions of these courts affirm that the protections secured by the Commerce Clause accrue to individuals and are recognized as "rights."

In *Kennecott Corporation v. Smith*, 637 F.2d 181 (3rd Cir. 1980), suit was brought under 42 U.S.C. § 1983 challenging regulation by the State of New Jersey of tender offers as violative of the Commerce Clause and the Williams Act. The Court of Appeals therein found that action was:

> properly brought under § 1983 because it seeks redress for deprivations of constitutional *rights* secured by the Commerce Clause. . .

Kennecott, supra at 186, n. 5. (Emphasis supplied.)

Similarly, in the Sixth Circuit a § 1983 action was brought challenging a portion of Michigan's statutory securities regulation scheme as imposing unconstitutional burdens upon interstate commerce. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982). The Court of Appeals found such claims to have been validly brought under § 1983.

In this case the Ninth Circuit Court of Appeals held that the Commerce Clause created "no individual rights." Thus, the Court denied petitioner's claims brought within 42 U.S.C. § 1983 under jurisdiction of 28 U.S.C. § 1343. In so doing, the Ninth Circuit has placed itself in direct conflict with the Third and Sixth Circuits.

In its holding of no jurisdiction for petitioners' Commerce Clause claims, the Ninth Circuit has made a sweeping decision, the literal impact of which seems to disallow any action by an individual to enforce rights conferred by the Commerce Clause.

This Court has specifically asserted and reaffirmed the application of the Commerce Clause to individual citizens. In *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), a criminal conviction for interstate transportation of Oklahoma minnows and the state statute upon which it was based, were struck down as violative of the Commerce Clause. The reasoning in *Hughes* was based upon that in prior cases which linked the Commerce Clause to rights of individuals to be free from unreasonable discrimination by the states.

More precisely, *Hughes* and the decisions supporting it affirm the right of the individual under the Commerce Clause to be free form abuse by a state of its governmental power.

> And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.
>
> Although stated in reference to the Privileges and Immunities Clause challenge, this reasoning is equally applicable to the Commerce Clause challenge.

Hughes, supra, 441 U.S. at 334, quoting *Toomer v. Witsell*, 334 U.S. 385, 402, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

The original intent of the Commerce Clause as evidenced by its source document, the Articles of Confederation, was to secure the rights of commerce for individuals.

> . . . the people of each State shall have free ingress and regress to and from any other State, and shall enjoy

> therein all the privileges of trading commerce, subject to the same duties, impositions and restrictions as inhabitants thereof. . . .

Article IV of the Articles of Confederation. *See* also, *New Hampshire v. Piper*, 470 U.S. 274,105 S.Ct. 1272, 84 L.Ed.2d 205 (1985).

As respondents have admitted in their answer, jurisdiction for petitioners' Commerce Clause claims exists as well under both 28 U.S.C. §§ 1331 and 1333. Jurisdiction under either one of these sections, or under §1343 as explained above, is wholly sufficient to support petitioners' claims.

An individual has a constitutional right to ply his or her trade and to pursue commerce in any of the several states, and this right should be redressable in each of the federal courts under the Commerce Clause.

This Court should not countenance a judicial practice of protecting or denying individual rights arising from identical actions depending upon which state in the union the action affecting Commerce has occurred.

CONCLUSION

Alaska statute 23.40.210 in effect establishes a tariff upon the labor of all public employees within the state who are covered by a collective bargaining agreement. The tariff is paid through a 22½% wage disparity.

This discrimination in wages is determined not upon where the labor is performed, but rather upon the origin, i.e., the state of residence, of each member of the labor force. Thus, the tariff erects an economic barrier at the borders of the state. This barrier discriminates against nonresident employees without a substantial reason so as to implicate the Privileges and Immunities Clause. It penalizes emigration from the state so

as to implicate the constituional right to travel and it penalizes the commerce of labor entering the state so as to implicate the Commerce Clause.

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the issues raised in this case.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS; PACIFIC MARITIME ASSOCIATION, a labor organization; KURT K. PETRICH; ROBERT W. SEIDMAN, et al., Plaintiffs-Appellants,	No. 86-3727
v.	D.C. No. A-82-465-CV
ELEANOR ANDREWS, Commissioner of Administration of the State of Alaska, RICHARD J. KNAPP, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska; MARTIN NUSBAUM, Director of Administrative Support of the Division of Marine Highway Systems of the State of Alaska; JOHN DOES II-X, officers of the State of Alaska, Defendants-Appellees.	OPINION

Argued and Submitted
January 7, 1987-Seattle, Washington

Filed October 29, 1987

Before: Eugene A. Wright, Jerome Farris and Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer

Appeal from the United States District Court for the District of Alaska James M.Fitzgerald, Chief District - Judge, Presiding

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SUMMARY

Constitutional Law/Labor/Statutes

Appeal from judgment. Affirmed in part, vacated in part.

The State of Alaska owns and operates the Marine Highway System. Alaska Marine Highway System (AMHS) vessels call regularly at Seattle. The International Organization of Masters, Mates and Pilots (IOMM&P) represents deck officers employed by AMHS. The purpose of Alaska Statute 23.40.210 is to encourage Alaska residents to seek employment with AMHS. Appellants sued for declaration that the statute violated various clauses of the constitution. The district court upheld the statute.

[1] Appellants claim that the statute burdens their interest in pursuing employment with AMHS. A nonresident's right to "ply a trade, practice an occupation, or pursue a common calling within the State" is a fundamental right protected by the privileges and immunities clause. [2] The statute does not limit the number of nonresident workers, favor the hiring of Alaskan workers, or make employment with AMHS unprofitable for nonresidents. [3] Further, appellants have not shown that the statute undermines interstate comity and economic unity that the clause was designed to engender. Thus, the statute in no way interferes with interstate relations or with the freedom of nonresidents to seek employment with or residence in Alaska. [4] Nonresident employees do not have standing to

challenge the statute based on their right to travel because their freedom to leave Seattle is not affected by the statute. [5] States may not violate the constitutional right to travel by conditioning public benefits or political rights on term of residency. [6] This court need not decide whether the statute is a bona fide residency requirement. For the purposes of the Equal Protection Clause, public employment is not a fundamental right. The statute, therefore, must be, and is, rationally related to the end of attracting Alaskan residents to work for AMHS. [7] The court had no jurisdiction to consider the appellants' Commerce Clause claims, [8] nor do appellants state a cause of action under it. It does not protect individuals from abuse of government authority nor does it create any individual rights.

COUNSEL

Richard S. Oettinger, Seattle, Washington, for the plaintiffs-appellants International Organization of Masters, Mates & Pilots, and Pacific Maritime Association

Kelby D. Fletcher, Seattle, Washington, for plaintiffs-appellants Petrich, et al.

Jam Hart DeYoung, Anchorage, Alaska, for the defendants-appellees Andrews, et al.

OPINION

BEEZER, Circuit Judge:

The International Organization of Masters, Mates & Pilots (IOMM&P) and members of the Inland Boatman's Union (the Petrich plaintiffs) appeal from judgment upholding an Alaska statute

granting cost of living wage adjustments to resident, but not nonresident employees of the Alaska Marine Highway System (AMHS). The district judge held that AS 23.40.210 does not violate the Privileges and Immunities Clause, the right to travel, the Commerce Clause, or the Equal Protection Clause. We affirm.[1]

I

Background

The State of Alaska owns and operates the Marine Highway System.

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[1]The Petrich Plaintiffs also challenge a provision in the IBU-AMHS labor agreement requiring AMHS employees to commence and terminate work shifts at Alaskan ports. AS 19.65.010. Alaska repealed AS 19.65.010 in 1982. *See* 1982 Alaska Sess. Laws, ch. 59 § 52. We agree with the district court that repeal of AS 19.65.010 renders unnecessary consideration of constitutional challenges to either the statute or the corresponding provision in the IBU-AMHS labor agreement. *See Int'l Org. of Masters, Mates & Pilots v. Andrews*, 626 F. Supp. 1271 n.1 (1986).

AMHS vessels call regularly at Seattle. The AMHS is the only surface transportation connecting many communities along the Alaska coast. The IOMM&P represents deck officers employed by AMHS. Kurt Petrich and other named plaintiffs in this action are employed as deck hands for AMHS and are represented by the IBU. The IBU is not a party to this action. Both the IOMM&P and the Petrich plaintiffs (hereafter collectively referred to as "Appellants") include Washington resident employees of AMHS.

Alaska Statute 23.40.210 requires that every labor agreement between public employers in Alaska and any labor organization provide that wages of nonresident employees not increase until the difference between wages paid to residents and wages paid to nonresidents "reflect the difference between the cost

of living in Alaska and living in Seattle, Washington." The purpose of AS 23.40.210 is to encourage Alaska residents to seek employment with AMHS. AS 23.40.210 has been incorporated into current labor agreements between AMHS and the IOMM&P and AMHS and the IBU.

Appellants sued under 42 U.S.C. § 1983 for declaration that AS 23.40.210 and corresponding provisions of labor agreements violated the Privileges and Immunities Clause of Article IV, the right to travel, the Commerce Clause, and the Equal Protection Clause.[2] The district court upheld AS 23.40.210 against the constitutional challenges. *Int'l Org. of Masters, Mates & Pilots v. Andrews*, 626 F. Supp. 1271 (1986) *("IOMM&P")*

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[2]Appellants do not press the Equal Protection claim on appeal.

II

Jurisdiction and Standard of Review

The district court had jurisdiction under 28 U.S.C. § 1343. We have jurisdiction under 28 U.S.C. § 1291. This appeal presents mixed questions of fact and constitutional law. We review the district court's determinations *de novo*. *ACORN v. City of Phoenix*, 798 F.2d 1260, 1263 (9th Cir. 1986).

III

Analysis

Appellants claim that AS 23.40.210 violates the Privileges and Immunities Clause of Article IV, Section 2, the Commerce Clause, and the right to travel as embodied in the Constitution. We address each argument in turn.

A. *Privileges and Immunities*

Article IV, Section 2, Clause 1 of the Constitution provides the "Citizens of each State shall be entitled to all

Privileges and Immunities of Citizens in the several States." The purpose of this clause is,

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1977)(quoting *Paul v. Virginia*, 8 Wall. 168, 180 (1869)).

This clause seeks to ensure the unity of the several states by protecting those interests of nonresidents which are "'fundamental' to the

promotion of interstate harmony." *United Bldg. and Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984). 42 U.S.C. § 1983 embodies individual rights cognizable under this provision.

To assess the appellant's privileges and immunity claim we determine first whether AS 23.40.210 burdens such fundamental rights. *Camden*, 465 U.S. at 218. If it does, we determined next whether the state's reason for discriminating between residents and nonresidents is "substantial" and "whether the degree of discrimination bears a close relation to [those reasons.]" *Camden*, 465 U.S. at 222.

[1] The appellants claim that AS 23.40.210 burdens their interest in pursuing employment with AMHS. A nonresident's right to "ply [a] trade, practice [an] occupation, or pursue a

common calling within the State" is a fundamental right protected by the privileges and immunities clause. However, whether public employment is a fundamental right within the Privileges and Immunities Clause remains unsettled. *Camden*, 465 U.S. at 219-220.

[2] We need not decide the question whether public employment is subject to the requirements of the Privileges and Immunities Clause because the appellants have not shown that they are prevented or discouraged by the State from pursuing employment with AMHS. Unlike state practices which have been struck down, the Alaska statute does not limit the number of nonresident workers, *Camden*, 465 U.S. 208 (1984), favor the hiring of Alaskan workers, *Hicklin*, 437 U.S. 518 (1977), or make employment with AMHS unprofitable for

nonresidents. *Toomer v. Witsell,* 334 U.S. 385 (1948). In fact, AS 23.40.210 enhances nonresidents' prospects for employment by making nonresident labor less expensive and more attractive than competing resident labor.

[3] Furthermore, the appellants have not shown that AS 23.40.210 undermines interstate comity and economic unity that the clause was designed to engender. *See, e.g., Camden,* 465 U.S. at 218. This statute, designed to provide equity between the wages of Alaskan and non-Alaskan workers, is not one which pressures other states to legislate or retaliate in response. *See Austin v. New Hampshire,* 420 U.S. 656, 666-667 (1974). The Alaska statute in no way interferes with interstate relations or with the freedom of nonresidents to seek employment with or residence in Alaska.

B. *Right to Travel*

Appellants claim that AS 23.40.210 burdens the rights of both residents and nonresidents to travel. Although the source of the right to travel is obscure, it is protected by the Equal Protection Clause of the Fourteenth Amendment. *Zobel v. Williams,* 457 U.S. 55, 60 n.6 (1981)(The "right to travel analysis refers to little more than a particular application of equal protection analysis.")

[4] Nonresident employees do not have standing to challenge AS 23.40.210 based on their right to travel because their freedom to leave Seattle is not affected by the statute. Only one of the Petrich plaintiffs, David Lisle, has standing to assert that AS 23.40.210 violates his right to travel. Lisle is the only resident appellant who has sworn that he "would like to live

elsewhere [than Alaska], but [has] avoided moving in large part due to the wage differential required by statute and the collective bargaining agreement." *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977)(standing requires a showing of "at least a substantial probability" that the relief sought would remedy the alleged injury.)

[5] The Supreme Court has held that states may not violate the constitutional right to travel by conditioning public benefits or political rights on a term of residency. *See, e.g., Zobel*, 457 U.S. 55 (1982)(invalidating Alaska's dividend distribution plan based on years of residency); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating residency requirement for voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969)

(invalidating residency requirement for welfare benefits); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating residency requirements for indigent medical care); *Attorney General v. Soto-Lopez*, 106 S.Ct. 2317 (1986) (invalidating veteran hiring preference based on residence at time of military service). However, states may condition nonessential benefits and rights, such as lower college tuition, *Vlandis v. Kline*, 412 U.S. 441 (1973), and dissolution of marriage, *Sosna v. Iowa*, 419 U.S. 393 (1973), on a term of residency without violating the Equal Protection Clause.

States also may impose a "bona fide residence requirement" to ensure that its services and benefits go to actual residents of the state.

> A bona fide residence requirement, appropriately defined and uniformly applied

> furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. . . . It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents. *Martinez v. Bynum*, 461 U.S. 321 (1983); *see also McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645 (1976)

[6] We need not decide whether AS 23.40.210 is a bona fide residency requirement, because the appellants' claim does not involve an essential benefit or political right. For the purposes of the Equal Protection Clause, public employment is not a fundamental right. *Camden*, 465 U.S. at 219 (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per*

curiam)). AS 23.40.210, therefore, must be "rationally related" to the end of attracting Alaskan residents to work for AMHS. We find that the Alaska statute is rationally related to that end.

C. *The Commerce Clause*

[7] Appellants claim that AS 23.40.210 violates the Commerce Clause (Article 1, § 8). The district court assumed subject matter jurisdiction over the Commerce Clause claims and granted judgment for defendants on the merits. We hold that the court had no jurisdiction to consider the appellants' Commerce Clause claims. Although the district court did not discuss the basis for its jurisdiction, appellants suggest three possibilities; 28 U.S.C. §§ 1343 (civil rights), 1331 (federal question), and 1333 (admiralty).

[8] We hold that appellants state no cause of action directly under the

Commerce Clause, regardless of the relief sought. The purpose of the Commerce Clause is allocation of power between state and national governments, not protection of individuals from abuse of government authority. *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir. 1985), *cert. denied*, 107 S. Ct. 940 (1987). The Commerce Clause creates no individual rights. Other clauses of the Constitution, such as the Due Process and Equal Protection Clauses, protect persons and are appropriate vehicles for vindication of individual rights. The appellants have no cause of action under the Commerce Clause within section 1343 or section 1331.

We must also reject the appellants' assertion that this case arises under the federal courts' admiralty jurisdiction, 28 U.S.C. § 1333. Nothing

in section 1333 suggests that federal courts should more readily infer existence of a cause of action under the Commerce Clause when parties engage in shipping rather than in other activities.

IV

Conclusion

AS 23.40.210 does not violate the Privileges and Immunities Clause or the right to travel as embodied in the Constitution. Appellants state no cause of action directly under the Commerce Clause or under section 1983 for Commerce Clause violations. The portion of the district court opinion considering the merits of appellants' Commerce Clause claims is vacated. The portion of the opinion considering appellants' Privileges and Immunities and right to travel claims is affirmed.

AFFIRMED IN PART AND VACATED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS PACIFIC MARITIME REGION, a labor organization,	)	
Plaintiff,	)	
vs.	)	
ELEANOR ANDREWS, Commissioner of Administration of the State of Alaska; RICHARD J. KNAPP, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska; MARTIN NUSBAUM, Director of Administrative Support of the Division of Marine Highway Systems of the State of Alaska; and JOHN DOE officers Two through Ten, officers of the State of Alaska,	)	OPINION
Defendants.	)	
KURT PETRICH, ROBERT W. SEIDMAN, JOHN W.S. LAM, WILLIAM P. TURNER, SANDRA JENSON, GRANT R. WEBBER, RONALD P. TYRELL, MIKE McROBERTS, DAVID ROBERTS,	)	

ROBERT E. SMITH, FRANK R. EWING, PIERRE L. RUTLEDGE, LAWRENCE E. MARKHAM, ARLENE G. SHEETS, PAUL K. JUDD, DAVID LISLE, PATRICK KANGAS, WILLIAM PETRICH, CLEMENT WISCHINSKI, DONALD E. BESSE, DAVID KUTZ, ROBERT CHAMBERLAIN, VICTOR FREISE, WALLACE BLACKWELL, BILLIE ALSUP, JR., CHARLES H. KNIGHT,

Plaintiffs,

vs.

ELEANOR ANDREWS, Commissioner of Administration of the State of Alaska; RICHARD J. KNAPP, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska; MARTIN NUSBAUM, Director of Administrative Support of the Division of Marine Highway Systems of the State of Alaska; and JOHN DOE officers Two through Ten, officers of the State of Alaska,

Defendants.

Consolidated Under A82-465 CIV

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Counsel for Defendants:	Laura L. David Assistant Atty General Pouch K - State Capitol Juneau, AK 99811

The Alaska Marine Highway System (AMHS) is owned and operated by the State of Alaska through its Department of Transportation and Public Facilities, and operates ferries transporting passengers, mail, and personal and commercial motor vehicles between Seattle and Alaska, as

well as between various Alaskan ports. In 1977, the Alaska Legislature amended the Alaska Public Employment Relations Act, AS 23.40.210 (1985), and provided for cost-of-living wage differentials between AMHS's Alaska-resident and nonresident employees. The International Organization of Masters, Mates, and Pilots, Pacific Maritime Region (IOMMP), which is the collective bargaining representative for sixty-five to seventy AMHS licensed deck officers, and twenty-six other AMHS employees belonging to the Inland Boatman's Union (IBU) brought these actions to challenge the constitutionality of the wage differentials.[1] They claim

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[1]The individual plaintiffs originally challenged the constitutionality of Alaska's "Change Port" statute, AS 19.65.010, as well as the cost-of-living differentials provided under AS 23.40.210.

that the differentials violate the federal constitution's commerce clause, U.S. Cosnt. art. I, § 8, cl. 3, equal protection clause, U.S. Const. amend. XIV, § 1, and privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1, and that they operate to deprive the plaintiffs of the "right to travel" guaranteed by the

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AS 19.65.010 provided that: "No employee of the Alaska marine highway system may be relieved at a duty station or port which is outside the state." The nonresident plaintiffs claimed that by prohibiting them from beginning and concluding their shifts in Seattle, AS 19.65.010 impermissibly burdened their right to work on AMHS. However, the Alaska legislature repealed the statute in 1982. See 1982 Alaska Sess. Laws, ch. 59 § 52. Therefore, I need not determine the validity of the "Change Port" statute. See generally District No. 1, Pacific Coast District, M.E.B.A. v. Alaska, 682 F.2d 797 (9th Cir. 1982).

fourteenth amendment.[2]

The plaintiffs seek declaratory and injunctive relief, as well as money damages.[3] The defendants, Alaska state

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[2]The plaintiffs have elected to challenge the cost-of-living differentials in this action exclusively under the federal constitution, and not under the Alaska state constitution. Had the plaintiffs chosen to raise a state constitutional challenge, I would have been required to consider different factors in my analysis and conceivably could have reached a different result, see Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269-74 (Alaska 1984); Note, Alaska Pacific Assurance Co. v. Brown: The Right to Travel and the Constitutionality of Continuous Residency Requirements, 2 Alaska Law Review 339 (1985); see also Robison v. Francis, No. 3011, slip op. at 32 (Alaska January 17, 1986) (Burke, J., concurring) ("The fact that . . . a statute [may] satisfy the requirement[s] of the United States Constitution does not mean that the same statute will pass muster under . . . the Alaska Constitution."), but I express no opinion on such a challenge at this time.

[3]Because I conclude that the plaintiffs' claims do not succeed on the merits, I need not decide to what

officials who administer AMHS, maintain that AS 23.40.210 is constitutionally sound. The parties have both moved for summary judgment. I grant the defendants' motion for summary judgment.

FACTUAL BACKGROUND

Alaska began to operate AMHS in 1962. At present, AMHS is the only public surface transportation system connecting the various communities in southeast Alaska, as well as many communities in southwest Alaska. Since most of these communities are inaccessible by road, AMHS provides the primary means of supplying their residents with food and other essential commodities. The annual operating expenses of AMHS substantially

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extent this court could award money damages to the plaintiffs in their actions against state officials.

exceed the annual revenues it generates; as a result, each year during its budget process, the State allocates funds out of its general revenues to cover the difference. See AS 37.07 (1985) (Executive Budget Act).

When Alaska established AMHS in 1962, it based the wage schedule for AMHS employees on prevailing wages for comparable work in California, Oregon, and Washington, and added 25% to offset what was then assumed to be the higher cost of living in Alaska. A 1980 comparative-wage study revealed that IOMMP members working on AMHS earned between 35 and 40% more than their fellow union members working on the Washington state ferry system. The record suggests that at least part of this disparity in wage levels was attributable

to the significantly more demanding job requirements and work shifts on AMHS compared with the Washington system.

According to statistics in the record supplied by federal agencies, the cost of living in Anchorage in 1980 for a typical family of four was at least 22.5% higher than that in Seattle. See U.S. Department of Labor, Bureau of Labor Statistics, "Autumn, 1980 Urban Family Budgets and Comparative Indexes for Selected Urban Areas" (1981).[4] The cost of living in

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[4]The statistical studies in the record provided by the Bureau of Labor Statistics compare the cost of living in Anchorage and Seattle for four-person families living on relatively "lower," "moderate," and relatively "higher" budgets. The statistics indicate that in 1980, the cost of living was about 50% higher in Anchorage for families on relatively "lower" budgets, about 35% higher for families on "moderate" budgets, and about 23 to 24% higher for families on relatively "higher" budgets.

Juneau during 1980 was approximately the same as that in Anchorage. See U.S. Office of Personnel Management, Cost of Living Allowance Program, "Cost of Living Surveys for Juneau and Anchorage, 1980" (1981). Alaska has prepared studies concerning the relative cost of living in cities throughout the state, and these indicate that the cost of living in both Juneau and Ketchikan is substantially the same as that in Anchorage, while the cost of living in other southeastern cities such as Petersburg, Sitka, and Haines is slightly higher. See State of Alaska Department of Administration, Division of Personnel, "Election District Pay

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See U.S. Department of Labor, Bureau of Labor Statistics, "Autumn, 1980 Urban Family Budgets and Comparative Indexes for Selected Urban Areas" (1981).

Differentials" (1970); see also AS 39.27.020 (1985) (establishing "pay step differentials" for unrepresented state employees "by election district and in other states": employees residing in Juneau, Ketchikan, Petersburg, and Sitka are paid on the same scale as those in Anchorage, while those living in Haines are paid one step higher).

The plaintiffs have not offered any evidence that the cost of living in Anchorage and southeastern Alaska is less than 22.5% higher than that in Seattle. Nor have they offered any evidence that the cost of living in other parts of Washington state or other places where AMHS employees reside is higher than that in Seattle. Thus, the evidence in the record indicates that the cost of living

in Anchorage and southeastern Alaska is at least 22.5% higher than that in Seattle and the other areas where AMHS's non-resident employees reside.

The plaintiffs have offered evidence that the Consumer Price Index, which measures the rate the cost of living has increased in various cities since 1967, was greater for the Seattle-Everett area in 1979 than for Anchorage. See U.S. Department of Labor, "Consumer Price Index for Urban Consumers" (1979 and 1983 editions). Moreover, they have shown that between 1979 and 1983, the Consumer Price Index increased 35% more in Seattle-Everett than in Anchorage. Nevertheless, even with this faster growth in Seattle's cost of living in recent years, nothing in the record indicates that the difference

in the cost of living between Anchorage and Seattle has ever fallen below 22.5%.

Both state and federal employees in Alaska have lone received wage adjustments to compensate them for the relatively high cost of living in the state. As of 1981, federal employees in Alaska received a cost-of-living allowance that ranged from a minimum of 10% of their base salaries (for those with commissary privileges) or 17.5% (for those without such privileges) to a maximum of 25% of their base salaries, depending upon the employee's duty station. The State has adjusted the wages paid to its unrepresented non-maritime employees since 1966, depending upon the cost of living in each employee's election district. AS 39.27.020 provides that such employees residing outside the

state be paid six steps--currently about 22.5%--less than those employees living in Anchorage, Juneau, or Ketchikan. See AS 39.27.020. In 1972, with the passage of the Alaska Public Employment Relations Act, AS 23.40.070-23.40.260, the State initiated collective bargaining with its nonmaritime, union employees; since then, Alaska has negotiated cost-of-living wage adjustments in all its collective bargaining agreements with nonmaritime unions. By 1977, the only collective bargaining agreements for Alaska state employees that did not contain cost-of-living adjustments in the pay plan were those negotiated with the three maritime unions working on AMHS.[5]

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[5]The three maritime unions whose members work on AMHS are the IOMMP, the IBU, and District No. 1, Pacific Coast

In 1977, the Alaska legislature amended AS 23.40.210. Although the 1977 amendment required that all state collective bargaining agreements include cost-of-living wage differentials, it was clearly targeted at the three AMHS unions, since their bargaining agreements were the only ones involving state employees that did not already include cost-of-living adjustments. As amended, AS 23.40.210 provides that:

> Upon the completion of negotiations between [a labor] organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. . . The agreement shall include a pay plan designed to provide for a cost of living differential between the salaries paid employees residing in the State and employees residing outside

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District, M.E.B.A. (MEBA).

> the State. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the State shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the State reflects the difference between the cost of living in Alaska and living in Seattle, Washington. . . .

AS 23.40.210 (emphasis added). The Alaska House Finance Committee's "letter of intent" concerning the 1977 amendment confirms that its primary purpose was to introduce cost-of-living wage differentials for AMHS employees:

> It is the intent of the House Finance Committee in passing the 1977 amendment to provide for a cost-of-living pay differential between Alaska Marine Highway employees who live in Alaska and those who live outside the state. The purpose of the bill is to encourage employees of the Marine Highway System to live in Alaska. It is not intended to mandate a pay raise or benefits

> increase for resident Ferry system employees. Rather, the differential should be implemented over a period of time through the collective bargaining process. For example, if the cost of living in Ketchikan is 15% higher than in Seattle, and a 6% increase were negotiated, the 6% raise--and subsequent raises--should apply only to Alaska residents until the cost-of-living differential is established. . . .

1977 State of Alaska House Journal 461.

As the amendment's legislative history indicates, the main reason for introducing cost-of-living differentials was to "encourage [AMHS] employees . . . to live in Alaska." According to the defendants, prior to the passage of the 1977 amendment, AMHS employees who remained or became Alaska residents were making a conscious and substantial sacrifice, given how much greater purchasing power their wages would have if

they moved to Washington or other states.

State officials testified in affidavits that there are advantages to having Alaska residents employed on AMHS. They assert that crew members from southeast Alaska are acutely aware of the importance of ferry service in supplying necessities to their communities, and therefore may be more committed than other employees to providing high-quality, dependable service, and less likely to endorse strikes that interrupt service. They also maintain that since AMHS employees represent Alaska to nonresident visitors and tourists, it is desirable from a public relations and tourism standpoint that at least some of these employees be Alaska residents with a demonstrated commitment to the state. The

defendants contend that since there is a value to having at least some Alaska residents as AMHS employees, the State should be permitted to alleviate conditions that discourage AMHS employees from remaining or becoming Alaska residents. They maintain that AS 23.40.210's cost-of-living differentials enable Alaska to compete on an even footing with Washington and other states to be the residence-state of AMHS employees.

As the legislative history also indicates, AS 23.40.210's cost-of-living wage differentials were intended to be phased in over time as new collective bargaining agreements were negotiated: the salaries of AMHS's nonresident employees were not to be immediately or drastically reduced, or those of resident

employees immediately raised. Alaska attempted to implement the cost-of-living differentials for the first time in its 1979 negotiations with AMHS unions, and began to incorporate the differentials in its 1980 labor agreements.

All base wage increases that the State has granted since July, 1979 have been limited exclusively to resident employees, although all employees have received some indirect increases in compensation and benefits. Thus, while nonresident employees' base wages have remained the same since 1979, the base wages of IOMMP's Alaska-resident members have increased 11 to 13%, those of IBU's resident members have increased 18 to 25%, and those of MEBA's resident members have increased 22.5%. The IOMMP's labor

agreements since 1979 have all included a provision that if AS 23.40.210 is found unconstitutional, nonresident union members will receive the back wages and wage increases they would have received had they been Alaska residents.

The plaintiffs contend that AS 23.40.210's cost-of-living wage differentials are unfair and unconstitutional.[6] They maintain that the existence of these differentials has operated to coerce many

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[6]Since the plaintiffs have challenged AS 23.40.210's wage differentials only insofar as they apply to the three unions with members working on AMHS, rather than all Alaska public employee unions, and since, as noted above, AS 23.40.210's wage differentials were targeted specifically at the three AMHS unions, I have considered the constitutional validity of the wage differentials only as applied to the three AMHS unions. My ruling on their constitutionality is therefore limited to the facts and circumstances of the present case.

AMHS nonresident employees to move to Alaska, noting that when the IOMMP filed suit in 1980, 34 of its 65 members working on AMHS were nonresidents (32 from Washington, mostly from around Seattle, and 1 each from California and Wisconsin), but that by 1983, only 24 of 69 IOMMP members working on AMHS were nonresidents.[7] Moreover, the plaintiffs have introduced evidence that at least some Alaska-resident employees of AMHS want to emigrate from the state, but feel compelled to remain because of the cost-of-living differentials.

The plaintiffs note that although

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[7]The record indicates that the majority of the 26 individual IBU plaintiffs are nonresidents, and that the majority of those are from the Seattle area. There is nothing in the record concerning fluctuation of these figures during the pendency of this litigation.

AMHS's nonresident employees' wages have been "frozen" since 1979, the Consumer Price Index indicates that the cost of living in Seattle has grown faster since 1979 than that of Anchorage. They contend that the cost-of-living adjustment provided by AS 23.40.210 is not precisely enough tailored: it differentiates simply between the class of all Alaska residents, whose wage levels are uniformly based on the cost of living in Anchorage, and the class of all nonresidents, whose wages are based on the cost of living in Seattle, and it does not take into account differences in the cost of living either within Alaska or throughout the rest of the United States. The plaintiffs maintain that there is no evidence indicating that nonresident employees are

harmful to AMHS or less qualified as a group than resident employees. They also note that both the IOMMP and the IBU already have clauses in their labor agreements providing for preferential hiring of Alaska residents, and they contend that these hiring preferences alone are sufficient to guarantee that Alaska residents will be well-represented on AMHS, without the added "preference" of cost-of-living differentials.

ANALYSIS

The plaintiffs contend that by "freezing" the wages of AMHS's nonresident employees and authorizing wage increases only to AMHS's Alaska-resident employees, AS 23.40.210 violates the federal constitution's commerce clause, equal protection clause, and privileges and

immunities clause, and violates AMHS employees' "right to travel" under the fourteenth amendment. I do not agree. I therefore grant the defendants' motion for summary judgment.

A. COMMERCE CLAUSE CLAIMS

The plaintiffs contend that AS 23.40.210's imposition of cost-of-living wage differentials violates the commerce clause. However, when a state acts in a proprietary capacity as a "market participant," rather than as a "market regulator," it is not subject to the limitations of the commerce clause, even if it uses its position "'to favor its own citizens over others.'" White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 206-08 (1983) (quoting Hughes v. Alexandria Scrap

Corp., 426 U.S. 794, 810 (1976)); accord South-Central Timber Development, Inc. v. Wunnicke, 104 S. Ct. 2237, 2243 (1984); Reeves, Inc. v. Stake, 447 U.S. 429, 436-40 (1980); Western Oil and Gas Association v. Cory, 726 F.2d 1340, 1342-43 (9th Cir. 1984), aff'd by equally divided court sub nom. Cory v. Western Oil and Gas Association, 105 S. Ct. 1859 (1985); see United Building and Construction Trades Council v. Mayor and Council of Camden (hereinafter "Camden"), 465 U.S. 208, 213, 220 (1984).

In operating AMHS, a state-owned business, and determining the wages to pay AMHS's employees, Alaska has acted as a "market participant," not as a "market regulator." See, e.g., White, 460 U.S. at 214-15 (city acted as market participant

when it contracted with firms for construction of public projects); Reeves, 447 U.S. at 440 (state acted as market participant when it sold cement produced at state-operated plant only to its own residents); Hughes, 426 U.S. at 809-10 (state operated as market participant in paying bounties for recycling of abandoned automobiles). The only market directly affected by Alaska's payment of cost-of-living adjustments to AMHS's resident employees is the labor market for the maritime transportation industry, in which Alaska is clearly a participant. The record does not indicate that AS 23.40.210 has caused "a substantial regulatory effect outside of that particular market." South-Central Timber, 104 S. Ct. at 2245-46 (emphasis added). Therefore, the

plaintiffs' claims based upon the commerce clause must fail, regardless of any impact AS 23.40.210's wage differentials may have upon AMHS's nonresident employees. See White, 460 U.S. at 210.

B. "RIGHT TO TRAVEL" CLAIMS

The plaintiffs contend, based upon the Supreme Court's decisions in Shapiro v. Thompson, 394 U.S. 618 (1969), Dunn v. Blumstein, 405 U.S. 330 (1972), and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), that by imposing wage differentials according to AMHS employees' states of residence, AS 23.40.210 infringes upon their "right to travel" guaranteed by the fourteenth amendment. The plaintiffs maintain that like the state statutes containing residence requirements that the Supreme Court

invalidated in Shapiro, Dunn, and Memorial Hospital, AS 23.40.210 penalizes their exercise of the "right to travel," and must therefore be reviewed under a strict scrutiny standard. I disagree. I conclude that AS 23.40.210's wage differentials do not penalize interstate travel, and thus do not require strict scrutiny review.

First, the wage differentials do not penalize AMHS employees who migrate to Alaska. Unlike the statutes invalidated in Shapiro, Dunn, and Memorial Hospital, AS 23.40.210 does not contain a durational residence requirement: it does not condition receipt of a state benefit upon a minimum period of residence within the state. See Memorial Hospital, 415 U.S. at 251 (imposing one-year county residence

requirement); Dunn, 405 U.S. at 334 (one-year state residence and three-month county residence requirements); Shapiro, 394 U.S. at 622 (one-year state residence requirement). AMHS employees qualify for the cost-of-living adjustment at the moment they become bona fide residents of Alaska. See AS 23.40.210; see also Martinez v. Bynum, 461 U.S. 321, 325-29 (1983).

The Supreme Court and other courts have distinguished between statutes like AS 23.40.210, which require only that individuals demonstrate bona fide, continuing residence in a state to qualify for benefits, and statutes like those in Shapiro, Dunn, and Memorial Hospital, which imposed durational residence requirements. Most, if not all, courts

have concluded that statutes without a durational residence requirement do not "penalize" exercise of the "right to travel." See Martinez, 461 U.S. at 325-29; McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 646-47 (1976) (per curiam); Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 277 (9th Cir. 1982); Hawaii Boating Association v. Water Transportation Facilities Division, 651 F.2d 661, 664 (9th Cir. 1981); Fisher v. Reiser, 610 F.2d 629, 635 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980). Since AS 23.40.210 does not require that AMHS employees reside in Alaska for any set period before becoming eligible for the cost-of-living adjustment, I conclude that it imposes no "penalty" upon AMHS

employees who migrate to Alaska.[8] If anything, the statute facilitates migration by these individuals to Alaska, because it removes the disincentive to migration resulting from Alaska's relatively high cost of living.

Second, AS 23.40.210's wage differentials do not penalize AMHS employees who emigrate from Alaska to other states. The Ninth Circuit has indicated that in actions alleging denial of individuals' "right to travel," "'the "penalty" [on interstate travel] required to invoke

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[8]I note in passing that even if there were a durational aspect to AS 23.40.210, the fact that it does not result in a "significant deprivation" to nonresidents, see infra, provides an independent basis for concluding that it does not penalize AMHS employees migrating to Alaska. See Hawaii Boating Association, 651 F.2d at 665; Fisher, 610 F.2d at 635-36; see also Sosna v. Iowa, 419 U.S. 393, 406-90 (1975).

strict scrutiny [must] involve[] a genuinely significant deprivation, such as a denial of the basic "necessities of life" . . . or the denial of a "fundamental political right."'" Hawaii Boating Association, 651 F.2d at 665 (citation omitted and emphasis in original); Fisher, 610 F.2d at 635-36. Unlike the statutes in Shapiro, Dunn, and Memorial Hospital, AS 23.40.210 does not deny necessities of life or fundamental political rights to nonresidents or any other group. See Memorial Hospital, 415 U.S. at 258-62 (withholding public medical assistance payments); Dunn, 405 U.S. at 336-42 (restricting right to vote); Shapiro, 394 U.S. at 622, 633-38 (withholding public assistance); see also Hawaii Boating Association, 651 F.2d at 664-65; Fisher,

635-36. It does not deprive AMHS's nonresident employees of their jobs or prevent them from earning salaries that compare favorably with those for similar employment in their own states; in fact the only state "benefit" it withholds from nonresidents is the cost-of-living wage adjustment.[9] According to the statistical comparisons in the record, this wage adjustment does not constitute a benefit at all, because it merely "equalizes" the purchasing power of AMHS employees

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[9]The plaintiffs maintain that the benefit at stake in this action is their right to employment in their chosen profession, which constitutes a fundamental right. However, the plaintiffs have not been deprived of their jobs with AMHS, nor is there anything in the record to indicate that they will be. Therefore, the only "benefit" that Alaska has denied to the plaintiffs is the right to receive the cost-of-living wage adjustment regardless of where they reside.

residing in Alaska with that of AMHS employees residing outside the state.[10] I conclude that Alaska's failure to provide this wage adjustment to AMHS's nonresident employees does not constitute "a genuinely significant deprivation," Hawaii Boating Association, 651 F.2d at 665, and therefore does not penalize AMHS

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[10] In Fisher v. Reiser, 610 F.2d 629 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980), the Ninth Circuit rejected a "right to travel" challenge to a Nevada statute that granted cost-of-living increases to workers' compensation beneficiaries residing in the state, but did not grant those benefits to nonresident beneficiaries. Unlike AS 23.40.210, the cost-of-living adjustments provided in the Nevada statute were designed to offset inflation, not the higher cost of living in Nevada relative to other states. The Nevada statute therefore appears to have granted a more one-sided benefit to state residents than AS 23.40.210, which was designed merely to achieve parity between the purchasing power of AMHS employees residing in Alaska and those residing in other states.

employees who choose to emigrate from Alaska to other states.

I note in passing that only in limited circumstances, if at all, can a "right to travel" challenge be maintained by former residents of a state who maintain that the state must continue to provide them with benefits as if they were still residents. See Califano v. Torres, 435 U.S. 1, 4-5 (1978); Fisher, 610 F.2d at 634-35; cf. Alaska Pacific Assurance Co., 687 P.2d at 269-74. States are entitled to provide direct benefits to their citizens in order to "make residence within [their] boundaries more attractive." Zobel v. Williams, 457 U.S. 55, 67 (1982) (Brennan, J., concurring). Bestowing such benefits on state residents, as AS 23.40.210 is alleged to do,

does not violate their "right to travel" merely because it makes the prospect of remaining in the state more attractive or eliminates disincentives to moving away. See Califano, 435 U.S. at 4; Fisher, 610 F.2d at 634.

Because I conclude that the wage adjustments provided in AS 23.40.210 do not penalize AMHS employees for migrating to or emigrating from Alaska, I conclude that the statute does not infringe upon the "right to travel." Therefore, AS 23.40.210 need not be reviewed under the strict scrutiny standard.

C. EQUAL PROTECTION CLAIMS

The plaintiffs also contend that the wage differentials imposed by AS 23.40.210 violate the equal protection clause of the fourteenth amendment. I do not agree.

Since AS 23.40.210 differentiates between the wages paid to state residents and nonresidents working on AMHS, it must satisfy the requirements of the equal protection clause. See Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862, 2866 (1985). However, because AS 23.40.210 does not penalize the "right to travel," burden any other fundamental right, or discriminate against a suspect class, it is reviewed under the "rational basis" standard, and will be invalidated "only if no grounds can reasonably be conceived to justify it." Benson, 673 F.2d at 278; Hawaii Boating Association, 651 F.2d at 666; see Hooper, 105 S. Ct. at 2866; Williams v. Vermont, 105 S. Ct. 2465, 2472 (1985); Metropolitan Life Insurance Co. v. Ward, 105 S. Ct. 1676,

1683 (1985); Fisher, 610 F.2d at 636; see also Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 388-91 (1978). I conclude that the Alaska legislature "could have reasonably concluded that the [wage differentials] would promote a legitimate state purpose," Williams, 105 S. Ct. at 2472; Metropolitan Life, 105 S. Ct. at 1683, and thereby reject the plaintiffs' equal protection challenge.

As noted above, the wage differentials imposed by AS 23.40.210 are designed to eliminate the economic disincentive to AMHS employees residing in Alaska that results from the state's high cost of living, and thus to ensure that at least some AMHS employees will be Alaska residents. The State maintains that Alaska residents employed on AMHS will

represent the state to nonresident tourists and visitors travelling on AMHS, and will therefore enhance the travel experiences of these passengers and perform a valuable public relations service for the state. To the extent that these Alaskan employees reside in the communities served by AMHS, they will also be acutely aware of the local conditions and needs of these communities and may help to sensitize other members of the crew. Moreover, it is desirable from Alaska's perspective that a state-subsidized business like AMHS employ at least some state residents. I therefore find Alaska's purpose in adopting AS 23.40.210's wage differentials to be a legitimate one. See generally Hooper, 105 S. Ct. at 2866-68; Williams, 105 S.

Ct. at 2472; Metropolitan Life, 105 S. Ct. at 1683; Zobel, 457 U.S. at 65.

The precise level of the wage differentials is roughly equivalent to the difference between the cost of living in the main Alaskan cities where AMHS employees reside (Anchorage, Juneau and Ketchikan) and that of the Seattle metropolitan area, where a majority of the nonresident AMHS employees in the IOMMP and the IBU reside. The wage differentials thus serve to equalize the purchasing power of most of AMHS's Alaska-resident employees with that of most of its nonresident employees. I therefore conclude that AS 23.40.210's wage differentials rationally further Alaska's legitimate purpose in adopting them. See generally Hooper, 105 S.Ct. at 2866-69;

Williams, 105 S. Ct. at 2472; Metropolitan Life, 105 S. Ct. at 1683; Zobel, 457 U.S. at 61-64.

The plaintiffs contend that the wage differentials adopted by Alaska do not accurately reflect the differences in cost of living actually experienced by AMHS's Alaska-resident and nonresident employees. They note that many resident employees live in parts of Alaska with costs of living significantly different from that in Anchorage, upon which their wage levels are based under AS 23.40.210, and that many nonresident employees reside in cities with costs of living significantly different from that in Seattle, upon which their wage levels are based. The plaintiffs further note that since 1980, when the cost-of-living

statistics relied upon by the State were compiled and when AMHS's nonresident employees' wages were first "frozen," Seattle's cost of living has increased more rapidly than Anchorage's. As a result, the plaintiffs maintain that the wage differentials adopted by Alaska under AS 23.40.210 are not tailored precisely enough to reflect economic reality, and therefore are not rational and violate the equal protection clause.

However, there is no requirement under "rational basis" analysis that state laws which do not impinge upon any fundamental interests must "'be drawn so as to fit with [absolute] precision the legislative purposes animating [them],'" Baldwin, 436 U.S. at 390 (quoting Hughes, 426 U.S. at 813), or that the state must

"justify to the penny any [wage] differential it imposes." Id. at 391; accord Hawaii Boating Association, 651 F.2d at 666; Fisher, 610 F.2d at 636-37. As long as the economic means employed by the legislature were "not unreasonably related" to the purposes they were designed to serve, the fact that the legislature "'might have furthered its underlying purpose more artfully, more directly, or more completely, does not warrant a conclusion that the method it chose is unconstitutional.'" Baldwin, 436 U.S. at 390 (quoting Hughes, 426 U.S. at 813).

On the basis of the record in this case, I conclude that the wage differentials adopted by Alaska under AS 23.40.210 are "not unreasonably related" to the

Alaska legislature's purpose of eliminating discincentives that will discourage AMHS employees from remaining or becoming Alaska residents. Cf. Alaska Pacific Assurance Co., 687 P.2d at 274 (invalidating, under state equal protection clause, Alaska statute that reduced benefits for workers' compensation recipients who migrated from Alaska, where reductions in benefits were based on the average weekly wage levels of their new states, rather than the differences in the cost of living between their new states and Alaska, but noting that "[i]f there were a way to equalize the buying power of benefit dollars in each state [the court] would have difficulty in concluding that [nonresident] recipients would . . . suffer any penalty despite a reduction in

actual dollars paid [them]") (emphasis added). The legislature has identified Alaska's relatively high cost of living as a leading disincentive to maintaining Alaska residency, and AS 23.40.210 represents a direct attempt to eliminate that disincentive.

Alaska has not been excessive in basing its wage differentials upon the relative costs of living in Anchorage and Seattle: as noted above, the record indicates that almost all Alaska-resident employees of AMHS reside in Anchorage or other cities with an almost identical cost of living, and that a majority of the nonresident employees of AMHS in the IOMMP and the IBU reside in the Seattle area. The plaintiffs have not demonstrated that the cost of living in other cities outside

of Alaska where they reside is significantly higher than in Seattle, or that any of them resides in a part of Alaska significantly more expensive than Anchorage. Moreover, although the plaintiffs point out that Seattle's cost of living has risen throughout the period that their wage levels have been frozen, they have not demonstrated that Anchorage's cost of living is less than 22.5% higher than that of Seattle, or that "freezing" their wages has made their jobs on AMHS less economically desirable than most jobs they could obtain in other states. As a result, they have failed to demonstrate that AS 23.40.210's wage differentials do more than compensate for Alaska's high cost of living, or that the statute's effect is to drive them out of

their AMHS positions.

Because I conclude that the existence and amount of the wage differentials imposed under AS 23.40.210 reasonably further a legitimate state purpose, I reject the plaintiffs' equal protection challenge.

D. "PRIVILEGES AND IMMUNITIES" CLAIMS

Finally, the nonresident plaintiffs contend that AS 23.40.210's wage differentials violate the privileges and immunities clause.[11] I do not agree. For a statute to violate the privileges and immunities clause, it must deny nonresi-

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[11]Only nonresidents are entitled to challenge a state's laws based upon the privileges and immunities clause. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 77 (1873); accord Camden, 465 U.S. at 217; Goldfarb v. Supreme Court, 766 F.2d 859, 864-65 (4th Cir. 1985); Hawaii Boating Association, 651 F.2d at 666.

dents equal treatment with respect to a right or privilege "'fundamental' to the promotion of interstate harmony." Supreme Court v. Piper, 105 S.Ct. 1272, 1276 (1985); Camden, 465 U.S. at 218; Baldwin, 436 U.S. at 383. Moreover, even if it burdens such a right, a statute will not violate the clause if "(i) there is a substantial reason for the difference in treatment [it requires]; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[12] Piper, 105 S.

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[12]In its decision in Piper, the Supreme Court conspicuously omitted any mention of the requirement, cited in many of its prior cases, that "[a]s part of any justification offered [under the privileges and immunities clause], nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" Camden, 465 U.S. at 222 (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

Ct. at 1279; Camden, 465 U.S. at 222.

I conclude that the interest

Although some courts have applied the "peculiar source of the evil" test even after Piper, see Robison, slip op. at 10, I interpret the Piper decision as reformulating, albeit slightly, the analysis to be applied in privileges and immunities cases.

I note further that the "peculiar source of the evil" test seems especially inappropriate in a case such as the present one, where a state is merely attempting to achieve parity between its own citizens and those of other states. The "evils" that AS 23.40.210 is intended to address are Alaska's high cost of living and the resulting tendency of AMHS employees to migrate from Alaska or to remain as residents of other states. These "evils" seem systemic and largely unattributable to individual persons. To the extent that I am required to apply the "peculiar source of the evil" test in this case, however, I conclude that if nonresidents working for AMHS are paid at the same wage levels as Alaska-resident employees, they will help to deter other AMHS employees from remaining in or moving to Alaska. In this respect, nonresident AMHS employees constitute a "peculiar source of the evil[s]" at which AS 23.40.210 is directed. See generally Camden, 465 U.S. at 222.

"burdened" by AS 23.40.210's wage differentials is not "fundamental" in nature. Furthermore, I conclude that even if this interest were fundamental for purposes of privileges and immunities analysis, Alaska has a substantial interest in eliminating disincentives that discourage AMHS employees from residing in the state, and its wage differentials bear a "substantial relationship" to its objective of eliminating, or at least minimizing, these disincentives.

I find that the interest asserted by the nonresident plaintiffs in this action--to receive a wage adjustment based upon Alaska's cost of living, even though they continue to reside outside the state--is not a "fundamental" privilege or immunity protected by the privileges and immunities

clause. The Supreme Court has held that the clause applies "'[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the nation as a single entity.'" Piper, 105 S. Ct. at 1276 (quoting Baldwin, 436 U.S. at 383). Although the Court has indicated that "the pursuit of a common calling is one of the most fundamental of th[e] privileges protected by the Clause," Camden, 465 U.S. at 219; accord Piper, 105 S. Ct. at 1276, 1277 n.9, AS 23.40.210 does not deprive the nonresident plaintiffs of the right to seek employment as ferry employees. It therefore differs from statues that have been held to infringe upon "fundamental" rights under the privileges and immunities clause by preventing nonresidents from pursuing their livelihoods or economic

opportunities in a given state. See, e.g., Piper, 105 S. Ct. at 1276-77 (total exclusion of nonresidents from admission to state bar); Camden, 465 U.S. at 219-22 (city ordinance requiring that 40% of employees of contractors and subcontractors working on city construction projects be city residents); Hicklin v. Orbeck, 437 U.S. 518, 520, 524 (1978) ("Alaska Hire" statute requiring all state oil and gas leases, easements, and contractual agreements to contain a provision "requiring the employment of qualified Alaska residents" in preference to nonresidents); Toomer v. Witsell, 334 U.S. 385, 389, 396 (1948) (state statute requiring nonresident shrimp fishermen to pay a license fee of $2,500 per boat and resident shrimp fishermen to pay a license

fee of $25 per boat); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 424-26 (1871) (state statute requiring resident traders to pay $12 to $150 for a license to do business, and nonresident traders to pay $300); Silver v. Garcia, 760 F.2d 33, 36-37 (1st Cir. 1985) (Puerto Rican statute requiring applicants for insurance consultants' licenses to reside in Puerto Rico one year prior to application); Robison, slip op. at 13 (Alaska local hire statute requiring that work on public construction projects in the state be performed by at least 90% Alaska residents); see also Alerding v. Ohio High School Athletic Association, 779 F.2d 315, ____ (6th Cir. December 17, 1985); Hawaii Boating Association, 651 F.2d at 666-67.

Unlike these other statutes, AS

23.40.210 does not explicitly exclude nonresidents from jobs on AMHS, cf. Piper, 105 S. Ct. at 1276-77; Hicklin, 437 U.S. at 520, 524; Silver, 760 F.2d at 36-37, does not limit the number or set of positions available to them, cf. Camden, 465 U.S. at 219-22; Robison, slip op. at 13, and does not establish higher barriers for them to satisfy than residents seeking AMHS employment, which may operate to exclude them from practicing their profession altogether. Cf. Toomer, 334 U.S. at 389, 396; Ward, 79 U.S. (12 Wall.) at 424-26. The statute differentiates between AMHS's resident and nonresident employees only by providing a cost-of-living wage adjustment to the resident employees.

Therefore, although the privilege at

issue in this action is related to the "fundamental" privilege of pursuing employment and economic opportunities in Alaska, it is significantly narrower and must be examined separately. See Sestric v. Clark, 765 F.2d 655, 664 (7th Cir. 1985) (rejecting privileges and immunities challenge to state requirement that nonresident attorneys seeking admission to state bar must pas bar exam, although nonresident attorneys moving to state could be admitted by motion, and concluding that "privilege" to be evaluated under privileges and immunities clause is not the general privilege to practice law, but merely the privilege to practice law without taking state bar exam); see also Alerding, 779 F.2d at ____ (rejecting privileges and immunities challenge to

state bylaw barring nonresident students from participating in state interscholastic sports, and indicating that privilege at issue was right to participate in interscholastic sports, not general right to obtain an education). Moreover, the fact that Alaska owns and is subsidizing AMHS must be considered in determining whether the privilege at issue is "fundamental" under the privileges and immunities clause. See Camden, 465 U.S. at 221.

In light of these considerations, I conclude that the right to receive cost-of-living wage adjustments while working on AMHS is not a fundamental privilege "'bearing on the vitality of the nation as a single entity,'" Piper, 105 S. Ct. at 1276 (quoting Baldwin, 436 U.S. at 383),

or necessary to preserve the "national economic union." Id.; see Baldwin, 436 U.S. at 388 (upholding significantly higher Montana license fees for elk hunting by nonresidents than by residents on ground that "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union"); Alerding, 779 F.2d at ____ (right to participate in interscholastic sports not "fundamental" under privileges and immunities clause); Sestric, 765 F.2d at 661, 664 (privilege of practicing law without taking bar exam not fundamental); Hawaii Boating Association, 651 F.2d at 666 ("right of access, at equal rates, to mooring privileges at a recreational boat harbor is not 'fundamental'"); see also Camden, 465 U.S. at 218-22. Therefore, I

reject the plaintiffs' challenge to AS 23.40.210 under the privileges and immunities clause.

But even if the privilege at issue were fundamental, AS 23.40.210's wage differentials would nevertheless satisfy the requirements of the privileges and immunities clause. Alaska has demonstrated a "substantial reason" for treating AMHS's resident and nonresident employees differently: its desire to eliminate economic disincentives that discourage AMHS employees from residing in Alaska, so that at least some AMHS employees will remain or become Alaska residents. See Piper, 105 S. Ct. at 1279; Camden, 465 U.S. at 222. As noted above, given that Alaska subsidizes AMHS's operations, it is reasonable for the State

to establish a wage structure that does not make it economically disadvantageous for AMHS employees to reside in Alaska. See generally Camden, 465 U.S. at 223. Moreover, the presence of at least some Alaska residents working on AMHS, where they will represent the state to nonresident tourists and visitors, is desirable from a public relations perspective and may enhance the experiences of those travelling on AMHS. Finally, the fact that some AMHS employees reside in the Alaskan communities served by AMHS may make them more attuned to local conditions, needs, customs, and political situations, and thus may help them to provide better service to these communities, to ease any tensions that develop between these communities and

AMHS, and to adjust if emergencies arise while AMHS vessels are passing through these communities.[13]

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[13]These reasons for seeking at least some Alaska-resident employees on AMHS are far more compelling that the justifications advanced unsuccessfully by the State of New Hampshire in Piper for totally excluding nonresidents from its state bar. Most of the qualities that New Hampshire asserted were essential to practice law in its state (i.e., familiarity with local rules and procedures, sense of ethics and concern about professional reputation, and willingness to perform pro bono and volunteer work) bore no necessary correlation to the individual attorney's state of residence, but instead merely reflected the individual attorney's diligence, professional standards, integrity and public-spiritedness. See Piper, 105 S. Ct. at 1279-80. As a result, the Supreme Court rejected the State's proffered justifications for its residence classification. See id. at 1280.

In contrast, many of the reasons offered by Alaska for eliminating practical disincentives to Alaska residency for AMHS employees (i.e., ability to represent the state, awareness of local needs and customs,

Moreover, the cost-of-living wage differentials implemented by Alaska under AS 23.40.210 "bear[ ] a substantial relationship to the State's objective." Piper, 105 S. Ct. at 1279; Camden, 465 U.S. at 222. By their very nature, the

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and acceptance in the local communities) involve qualities that correlate to place of residence. Therefore, the State's desire to have these qualities represented among AMHS's employees provides it with a "substantial reason" for employing cost-of-living differentials.

However, I reject the State's claim that Alaska residents are also more desirable employees for AMHS because their sensitivity to the needs of the communities served by AMHS makes them less likely to engage in strikes and work stoppages. I question whether local residents are any less likely to strike than any other group, see id. at 1279-80, and also question whether the State's desire to hire employees who may be unwilling to strike is a permissable basis for it to discriminate in the wage levels it pays its employees.

wage differentials eliminate the economic disincentives to residing in Alaska that result from its high cost of living, without offering AMHS employees a bonus or windfall for choosing to reside in Alaska or penalizing those who choose to live in other states. Cf. Alaska Pacific Assurance Co., 687 P.2d at 274 (because differentials paid by State of Alaska were based on average wage levels, rather than cost of living, the benefits of those migrating from Alaska dropped 42% more than the reduction they actually experienced in the cost of living.) It is difficult to imagine a "less restrictive means" by which Alaska could attain its objective. Piper, 105 S. Ct. at 1279; Sestric, 765 F.2d at 664. THe plaintiffs contend that the use of hiring preferences

for Alaska residents would be sufficient alone to ensure that a reasonable number of AMHS employees will reside in the state. However, hiring preferences do not address the crucial concern identified by Alaska in AS 23.40.210: that a uniform wage structure on AMHS creates disincentives to AMHS employees residing in Alaska, and may well lead Alaska-resident employees, once they have obtained jobs through hiring preferences, to migrate from Alaska to locations where their salaries will have greater purchasing power. Thus, the use of wage differentials appears to be the least restrictive means of meeting the State's concerns.

Furthermore, the Supreme Court has indicated that "'States [must be given]

considerable leeway [under the privileges and immunities clause] in analyzing local evils and in prescribing appropriate cures,'" particularly when they are "merely setting conditions on the expenditures of funds [they] control." Camden, 465 U.S. at 222-23 (quoting Toomer, 334 U.S. at 396). I conclude that Alaska has demonstrated a substantial reason for establishing cost-of-living wage differentials on AMHS and has demonstrated that these bear a substantial relationship to its objective. Thus, even if the privileges at issue in this case were "fundamental" for privileges and immunities purposes, AS 23.40.210 would not violate the privileges and immunities clause.

CONCLUSION

Because I conclude that AS 23.340.210's cost-of-living wage differentials do not violate the commerce clause, the "right to travel," the equal protection clause, or the privileges and immunities clause, I grant the defendants' motion for summary judgment.

DATED at Anchorage, Alaska this ____ day of January, 1986.

_____
United States District Judge

cc: James Bradley
Laura Davis
Kelby Fletcher
Richard Oettinger

APPENDIX C

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	District ALASKA
Case Title INT'L ORG. OF MASTERS, et al. v. ELEANOR ANDREWS, et al.	Docket Number A82-465 Civil Name of Judge JAMES M. FITZGERALD

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. This issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT defendants' Motion for Summary Judgement is hereby granted.

APPROVED:

/s/ JAMES M. FITZGERALD
U.S. District Court

Clerk JOANN MYRES, CLERK	Date 2/27/86
(By) Deputy Clerk /s/ PAMELA SUNDBERG	

cc: James Bradley, Laura Davis, Kelby Fletcher, Richard Oettinger
O&J #2709

APPENDIX D

Richard S. Oettinger
Reaugh & Prescott
3000 Westin Building
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Seattle, WA 98121

622-3000

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

INTERNATIONAL ORGANIZATION 465 OF MASTERS, MATES & PILOTS Pacific Maritime Region, consolidated a labor organization, Plaintiff, vs. LISA RUDD, et al., Defendants.	NO. A82 CIV Consolidated
KURT PETRICH, et al., Plaintiffs, LISA RUDD, et al., Defendants.	STATEMENT OF FACTS NOT IN DISPUTE

COME NOW:

Plaintiff International Organization of Masters, Mates & Pilots, Pacific Maritime Region (IOMM&P) through their attorneys, Joseph E. Fischnaller and Richard S. Oettinger of Reaugh & Prescott, and

Plaintiffs Kurt Petrich, et al. through Kelby Fletcher of Peterson, Bracelin, Young & Putra, Inc., P.S., and

Plaintiffs through their Alaskan counsel, James Bradley, of Robertson, Monagle, Eastaugh & Bradley, and

Defendants through their attorneys, Norman C. Gorsuch, Attorney General and Laura L. Davis, Assistant Attorney General for the State of Alaska,

and upon order of the court file this Statement of Undisputed Facts.

Counsel for all parties have met and conferred and agree that the following facts which one or more parties consider relevant to the resolution of this lawsuit are undisputed. This statement supplements but, except where in direct conflict, does not supersede the pleadings, answers to interrogatories, exhibits and affidavits on file in these actions.

OPERATIONS OF THE ALASKA FERRY SYSTEM

1. The State of Alaska through the Alaska Marine Highway System (AMHS), a division of its Department of Transportation and Public Facilities (DOT/PF), operates an interstate and international public ferry system between ports in Alaska and Seattle, WAshington. The southern terminus of the system is

located at Pier 48 of the Port of Seattle, at Seattle, Washington.

2. AMHS vessels regularly call at the Port of Seattle for pickup and discharge of passengers, mail, and personal and commercial motor vehicles including trailers. The vessels are the only public surface transportation system connecting the communities in southeast Alaska and also many in southwest Alaska. These areas consist of archipelagoes of several large and hundreds of small islands, unconnected by roads. For many communities, the vessels are the only source of essential foods, e.g., milk, produce, etc.

REVENUES AND EXPENSES OF AMHS

3. Pursuant to Title 23, U.S.C., Section 101, et seq. and 49 U.S.C. Section

1601 et seq., the AMHS has received money from the United States Government for the purposes of constructing, repairing and refurbishing vessels of the AMHS. Federal monies have not been used for paying wages or other operating expenses. The expenses of operating the AMHS are paid by the State of Alaska from general state revenues through its annual budget process in accordance with the Executive Budget Act (AS 37.07).

4. The annual operating expenses of the AMHS substantially exceed the annual revenues to the state from the system. A substantial portion of the system revenues are derived from fares of passengers and commercial vehicles which board the vessels in Seattle, Washington.

IDENTIFICATION OF MARITIME UNIONS

5. Since Alaska first began to operate the ferry system in 1962, the IOMM&P has been the collective bargaining representative for licensed deck officers employed by the State of Alaska aboard vessels of the AMHS. The other employees who work aboard vessels of the AMHS are represented by one of two other maritime unions; the Inlandboatmen's Union of the Pacific (IBU) or District No. 1, Pacific Coast District, M.E.B.A. (MEBA). The employees of each of the three maritime unions work aboard each vessel of the AMHS while the vessel is in operation. Members of the unions also work aboard the vessels when the vessels are not in operation, as for example when the vessels are being repaired or serviced in port. Alaskan and non-Alaskan residents work aboard the AMHS

vessels which operate among the southwest Alaskan ports (southwest run) and the vessels which operate among the southeast Alaskan ports, Seattle and Canada (southeast run).

6. Each of the three maritime unions now bargains independently on behalf of its members who are employed by the State of Alaska. However the first contract with the State of Alaska (which became effective as of the date in 1962 when the first ferry was operated by Alaska) was jointly negotiated and executed with Alaska by the IOMM&P and the IBU.

ALASKA PUBLIC EMPLOYMENT RELATIONS ACT

7. On September 5, 1972, the Public Employment Relations Act (AS 23.40.070 - .260) for the State of Alaska (PERA) became effective. That legislation

expressly declared that:

> "it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by
>
> (1) recognizing the right of public employees to organize for the purpose of collective bargaining;
>
> (2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment;
>
> (3) maintaining merit system principles among public employees." AS 23.40.070

8. Employees of the AMHS are covered under PERA and are for purposes of PERA, Class 2 employees. This means that they may lawfully engage in a strike for a limited time after mediation has failed

and after the majority of the employees in the collective bargaining unit have so voted by secret ballot (AS 23.40.200).

IDENTIFICATION OF PLAINTIFFS

9. Plaintiffs in these two consolidated actions are: (a) the IOMM&P, an unincorporated association, and (b) 26 named individuals who are members of the IBU.

10. The IOMM&P is the collective bargaining representative for 65-70 licensed deck officers employed aboard the Alaska State Ferries by the AMHS. When the IOMM&P filed suit in November 1980, 34 of its 65 deck officers were nonresidents of Alaska including one who resided (and still does) in California and one who resided in Wisconsin. As of April 1, 1983, of the 69 licensed deck officers who

were members of the IOMM&P and employed by the AMHS, 24 were nonresidents of Alaska. Approximately half of the nonresident deck officers reside in the vicinity of Seattle, Washington.

11. Among the other 26 plaintiffs are both Alaskan residents and non-Alaskan residents who are employed on the vessels of the AMHS and who are in the bargaining unit represented by the IBU. The majority of these 26 plaintiffs who reside outside of Alaska, reside in the vicinity of Seattle, Washington.

12. MEBA and IBU are not parties in these actions.

IDENTIFICATION OF DEFENDANTS

13. Defendants are Alaska state officials who are charged with the responsibility for applying and enforcing

AS 23.40.210. Defendant Lisa Rudd, the Commissioner of Administration has the primary responsibility for the implementation of AS 23.40.210. Defendants Daniel Casey, Commissioner of the Department of Transportation and Public Facilities, and Martin Nusbaum, Acting Director of the Division of Marine Highway Systems of the State of Alaska, assist in the negotiation of the collective bargaining agreements with the maritime unions.

WAGE DIFFERENTIAL STATUTE

14. All twenty seven plaintiffs in this action challenge the constitutionality of one section of PERA which is presently codified as AS 23.40.210. In 1977, that section was amended by adding the two sentences which

are underlined in the full body of that section which is set forth below:

> "Agreement. Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a pay plan designed to provide for a cost of living differential between the salaries paid employees residing in the State and employees residing outside the State. The plan shall provide that the salaries paid, as of August 26, 1977, to employees residing outside the State shall remain unchanged until the difference between those salaries and the salaries paid employees residing in the State reflects the difference between the cost of living in Alaska and living in Seattle, Washington. The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the

Labor Relations Agency."
(Emphasis supplied).

15. The 1977 amendment to AS 23.40.210 was introduced as House Bill No. 203. The Finance Committee Chairman's Letter of Intent on H.B. 203 appears in the 1977 State of Alaska House Journal at p. 461:

"FINANCE COMMITTEE
March 4, 1977
Letter of Intent

HB 203

It is the intent of the House Finance Committee on passing HB 203 to provide for a cost-of-living pay differential between Alaska Marine Highway employees who live in Alaska and those who live outside the state. The purpose of the bill is to encourage employees of the Marine Highway System to live in Alaska. It is not intended to mandate a pay raise or benefits increase for resident Ferry system employees. Rather, the differential should be implemented over a period of time through the collective bargaining process. For

example, if the cost of living in Ketchikan is 15% higher than in Seattle, and a 6% increase were negotiated, the 6% raise - and subsequent raises - should apply only to Alaska residents until the cost-of-living differential is established.

Further, it is the intent of the committee that this measure be reported as accompanied by a fiscal note of zero.

/s/
Steve Cowper, Chairman"
(Emphasis in Original)

EFFECTIVE DATE OF STATUTE'S IMPLEMENTATION

16. When AS 23.40.210 was amended and became law in 1977, it had no then present impact upon any of the plaintiffs because the collective bargaining agreements for all three maritime unions had almost a year left to run. AS 23.40.240 provides that the provisions of AS Chapter 23.40 do not modify an agreement which is in effect at the time

the Act became effective. When those three labor agreements expired on June 30, 1978 a one-year extension and a supplemental agreement which had been separately negotiated by the State of Alaska with each of the three maritime unions in 1978, became immediately effective. Those supplemental agreements which were to expire on June 30, 1979 did not include a pay plan designed to provide for a cost of living differential as mandated by AS 23.40.210.

17. During the negotiations for a new labor agreement to supplant the ones which were expiring on June 30, 1979, Alaska attempted for the first time to implement AS 23.40.210 by negotiating a wage increase which would apply only to Alaska residents.

18. On the date that the IOMM&P filed this suit in federal court (November 1980), Alaska and the IOMM&P had not agreed upon a new labor contract. However, three months later on February 20, 1981, a labor contract was executed by the IOMM&P and Alaska which included a cost of living differential as mandated by the statute.

19. The other two maritime unions also independently executed labor contracts which included a pay plan with a cost of living differential as mandated by the statute.

COST OF LIVING

20. The cost of living in various locations in Alaska as measured by statistics published by state and federal agencies is determined by comparing costs

both (1) among various Alaskan locations, and (2) between certain Alaskan locations and locations within other states. No single or composite statistic is published which measures the cost of living in Alaska on a state-wide basis. The State of Alaska has determined that the cost of living among its own 19 election districts varies widely. For example, the State of Alaska estimated that in 1970, the cost of living differential among the various election districts within the state was slightly greater than 40 percent.

21. The cost of living in Alaskan cities for which data is available indicates that those cities' cost of living is substantially higher than the Seattle-Everett area. Although some other cities in the United States have a cost of

living which is approximately equal to or greater than that in Anchorage, Juneau and Ketchikan, Alaska, as a general rule, the cost of living throughout most of Alaska is probably greater than most U.S. metropolitan areas. The cost of living in Barrow, Alaska probably greatly exceeds all metropolitan areas in the United States.

22. Federal employees receive a cost-of-living allowance to compensate them for the differences in living costs between Washington, D.C., and non-foreign areas. Federal employees who live and work in Alaska receive a cost-of-living allowance which ranged in 1981 between 10 (for those with commissary privileges) or 17.5 (for those without commissary privileges) and 25 percent of their base

salary, depending upon the location in Alaska of the employee's duty station.

23. The cost of living in Juneau and Ketchikan as measured by state and/or federal studies is not significantly less than that in Anchorage. The State of Alaska estimated that in 1970 the cost of living in the coastal communities served by AMHS did not exceed the cost of living in Anchorage by over 21%.

24. The IOMM&P has not presented to the state any factual basis for determining that the difference between the cost of living in Alaska and that in Seattle is less than 22½ percent. The State represents that neither the IBU nor MEBA has offered any such information. The IOMM&P and the individual plaintiffs have no knowledge as to the accuracy of

this representation but do not dispute it.

25. The cost of living in Seattle as measured by the Consumer Price Index published by the U.S. Bureau of Labor Index has increased since the individual plaintiffs or the members of the IOMM&P who are employed by the AMHS last received a general wage increase.

26. The CPI compares the cost of living in each of various locations to that measured in the same places in 1967. In July, 1979, the Consumer Price Index for "All Urban Consumers" specified for "All Items" (CPI) for the Seattle-Everett area, Washington was 217.5. The CPI for Anchorage, Alaska for that same period was 207.4. In January, 1983, the CPI for Seattle-Everett had risen to 297.5 while the CPI for Anchorage rose to 257.6.

Thus, during the period of time since July, 1979 that nonresidents have had a freeze on base wage increases, the cost of living for persons residing in the Seattle-Everett area has increased 37%. During the same period, the CPI increased 24% in Anchorage, Alaska. In other words, the CPI increased 35% more rapidly in Seattle than it did in Anchorage during that time. During the same period, Alaskan residents' base wages have increased between 11 to 13% for IOMM&P members and approximately 18 to 22½% for IBU members.

COST OF LIVING DIFFERENTIALS FOR NONMARITIME EMPLOYEES

27. The State of Alaska initially established wages for many, if not all, of its unrepresented nonmaritime employees by developing a wage schedule comparable to

that of the states of Washington, Oregon, and California for similar work, and adding 25 percent to offset the assumed higher cost of living in Alaska. Since at least 1966, the state has adjusted wages paid to many, if not all, of its unrepresented nonmaritime employees in accordance with the cost of living in the employee's election district as compared to the cost of living in Anchorage. AS 39.27.070 provides that employees who are not represented in collective bargaining units and are located outside Alaska are paid six steps, or approximately 22½% less than those located in Anchorage. The statute also provides that employees who are not represented in collective bargaining units and are located elsewhere in Alaska other than in Anchorage are paid

up to nine steps, or approximately 39% more than those located in Anchorage.

28. Since the commencement of collective bargaining with the nonmaritime employees in 1972, Alaska has negotiated cost-of-living adjustments to wages in its collective bargaining agreements with its nonmaritime unions. Before the 1977 amendment to AS 23.40.210, the only state employee collective bargaining agreements which did not contain a cost-of-living adjustment in the pay plan were those negotiated with the three maritime unions.

LABOR AGREEMENTS AFTER AS 23.40.210

29. The IOMM&P labor agreement which was negotiated and became effective on July 1, 1980 (1980 Agreement) included a provision for a base wage increase of $100

per person per month for only Alaska resident employees, and did not include any base wage increase for nonresident employees. That agreement provided that there would be negotiations for a new wage schedule for the following periods:

- July 1, 1981 through June 30, 1982, and
- July 1, 1982 through March 31, 1983.

Effective July 1, 1981 base wages for IOMM&P Alaska resident employees were raised again but the base wages of the IOMM&P non-Alaska residents were not. The difference in base wages in that contract period between residents and nonresidents performing identical jobs was as much as $608.00 a month. That contract also included a provision that in the event that AS 23.40.210 was struck down, deck officers who were deprived of wages would receive all such wages retroactively.

Specifically, that provision in the labor agreement provided:

> "It is understood that the wage increases set out above are limited by A.S. 23.40.210 to those Deck Officers who are residents of the State of Alaska. It is further recognized that the validity and constitutionality of A.S. 23.40.210 is currently the subject of litigation. It is therefore agreed that in the event that A.S. 23.40.210 is determined to be unconstitutional, void or inapplicable to the Deck Officers covered by the parties' collective bargaining agreement, then those Deck Officers who have been deprived of any wages or wage increases because they are not or were not residents of Alaska shall be made whole by receiving retroactively all wages and wage increases of which they have been deprived by virtue of A.S. 23.40.210."

For the period July 1, 1982 through March 31, 1983, no agreement was reached between IOMM&P and Alaska regarding wages. As a result of that impasse, a secret ballot

authorizing a lawful strike was taken pursuant to the right recognized in PERA. On April 18, 1983, the ballots were counted and a strike was authorized against the AMHS by the IOMM&P membership by a vote of 60 to 3.

30. The 1980 Agreement did include other provisions which affected compensation for both resident and nonresident employees (e.g., nonwatch pay in lieu of overtime to compensate the employees for all hours worked in excess of twelve, masters' pay which is a supremacy pay over the (MEBA) lead chief engineer to maintain the master as the highest paid crew member, and a uniform allowance increase of $2.00 a month). The difference between base wages presently paid to resident employees and nonresident

employees of comparable job classifications who are members of the IOMM&P is approximately 11 -- 13 percent.

31. The IBU agreements which have been negotiated since the 1977 amendment to AS 23.40.210 became effective have included base wage increases for Alaska resident employees, and have not included any base wage increases for nonresident employees. Specifically, for example, the collective bargaining agreement executed on or about August 7, 1980 provides as follows:

> "Rule 17 - Wage Schedule. The Agreement includes a pay plan providing a cost-of-living differential between employees living in the state and those living outside the state in accordance with A.S. 23.40.210. In accordance with that Statute, salaries paid employees residing outside the state shall remain unchanged until the difference between those salaries and the

> salaries paid employees residing in the state reflects the difference in the cost-of-living in Alaska and Seattle, Washington."

The agreements have included other provisions which have increased indirect compensation for all employees, regardless of residence, both resident and nonresident employees (e.g., supervisory classification adjustments, uniform allowance increases, maintenance and cure benefit increases, increased health benefit trust contributions, pension benefit increases, overtime rate increases). These increases are similar in nature but may have exceeded in amount increases effected under collective bargaining agreements negotiated prior to 1977. The difference between the base wages presently paid to resident and

nonresident employees of comparable job classifications who are members of the IBU is approximately 18 -- 22½ percent.

32. Wage rates for the job category of Able Bodied Seaman (AB) are instructive as to the effect of AS 23.40.210 upon Alaska resident and non-Alaska resident wages since 1979. The following chart depicts AB wages for both groups of employees:

	7-1-79-6-30-80	7-1-80-6-30-81	7-1-81-6-30-82	7-1-82-3-31-83
A/B-res	$11.79	$12.89	$13.89	$14.58/hr
A/B-nonr	$11.79	$11.79	$11.79	$11.90/hr

Wages for resident AB employees have increased to a level about 22.5% greater than nonresident AB employees. In addition to this differential, nonresidents residing in Seattle have experienced a more rapid rate of increase in the CPI, as evidenced by ¶ 26.

33. The current MEBA agreement contains a single wage schedule without regard to residence and also includes a cost-of-living differential for Alaska resident employees equaling 22½ percent of base wages. Specifically, that agreement provides in relevant part as follows:

> "17.02 Cost-of-Living Differential for Alaska Residents. Pursuant to AS 23.40.210, in addition to the basic wage schedule provided above, those Engineers who are residents of Alaska shall receive a cost-of-living differential for each pay period they are in pay status according to the following schedule:
>
> [Schedule shows a differential equal to 22½% of basic wage schedule rounded off to the nearest one dollar.]"

That agreement also contains a provision which provides as follows:

> "17.05 In the event that AS 23.40.210 is found to be unconstitutional in the current

> legal action between the State and its employees, the parties agree to immediately enter into negotiations pursuant to Rule 36."

34. Alaska represents that in bargaining with the maritime unions, it has relied primarily on the statistics published by the U.S. Bureau of Labor Statistics and on the wage differential provided by AS 39.27.020 for state employees located outside Alaska who are not represented by collective bargaining units. Each of 27 plaintiffs is without information sufficient to form a belief as to the accuracy of this statement but plaintiffs do not dispute that this may have been so.

35. AS 23.40.210 does not require and the State of Alaska has not adjusted the wages paid to IOMM&P, IBU and MEBA

employees employed by AMHS who reside in Alaska in accordance with the cost of living in the employee's election district as compared to the cost of living in Anchorage.

OTHER MISCELLANEOUS FACTS

36. The collective bargaining agreements executed by Alaska before 1979 with the IBU and the IOMM&P included base wage schedules for all of their membership employees without distinction based on residence of employees.

37. Both the IBU and the IOMM&P have agreed in their labor contracts with the State of Alaska to give preferential hiring to Alaskan residents.

38. Alaska nonresident maritime union employees are not of themselves or as a group inherently injurious or harmful

to the State of Alaska.

EFFECT OF AS 23.40.210

39. After July 1, 1979 nonresident Alaska maritime union employees have not had a base wage increase although Alaskan resident maritime union employees' base wages have increased by approximately the percentages set forth below:

(a) For IOMM&P Alaska resident employees - 11 to 13%;

(b) For IBU Alaska resident employees - 18 to 22½%; and

(c) For MEBA Alaska resident employees - 22½%.

40. The differentiation in pay between Alaska resident employees and nonresident employees has caused dissension and some tension between the two groups of employees.

CHANGE PORT

41. Regular employees of the AMHS on the southeast run who work on the vessels of the system work a schedule of at least one week on duty followed by at least one week off duty. Employees on the southeast run are paired so that two employees fill any one position on the vessel. On the southeast run, it is the present and customary practice for the senior member of a pair to select the port at which the crew change will occur from among the ports permitted under applicable collective bargaining agreements. See ¶ 45 with respect to the IBU agreement.

42. The preceding paragraph is not true with respect to the southwest run and their employees may work on the vessels for a full month or even several months at

a time.

43. Under the collective bargaining agreements between the state and the IBU, there may be additional costs to the state if any position on the southeast run is not filled by a regular scheduled crew change (e.g., overtime, early call back, travel time, etc.).

44. The state has agreed to regular crew changes on the southeast run outside Alaska for members of the IOMM&P and MEBA on the conditions that the state incur no additional cost and that no Alaska resident employee is required to travel outside Alaska to relieve another employee.

45. The current agreement between the state and IBU provides for regular crew changes only at Ketchikan and Juneau.

With respect to certain of the individual plaintiffs, the IBU has not agreed to waive or to permit them to waive any extra costs which could accrue to the state as a result of crew changes outside Alaska. Nonresident IBU members who are employed by AMHS incur significant airfare and other travel-related expenses in order to appear at an Alaskan change port even though their seniority might otherwise allow them to change ports in Seattle. These expenses further reduce the effective expendable income of non-Alaska residents compared to Alaska residents.

NO MATERIAL FACTS IN DISPUTE

46. There are no material facts in dispute which the parties consider necessary to be resolved in order to enter a summary judgment in this case.

DATED: April 26, 1983

PETERSON, BRACELIN, YOUNG & PUTRA, INC., P.S.

By /S/
Kelby Fletcher
Of Attorneys for
Kurt Petrich, et.al.

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NORMAN C. GORSUCH

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Laura L. Davis,
Assistant Attorney
General for the
State of Alaska for
Defendants
Lisa Rudd, et al.

No. 87-1271

In The
Supreme Court of the United States
October Term, 1987

International Organization of Masters, Mates & Pilots, Pacific Maritime Region, A Labor Organization; Kurt Petrich; Robert W. Seidman; *et al.*,

Petitioners,

v.

Eleanor Andrews, Commissioner of Administration of the State of Alaska;
Richard J. Knapp, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska;
Martin Nusbaum, Director of Administrative Support of the Marine Highway System of the State of Alaska;
John Does II-X, Officers of the State of Alaska,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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February 26, 1988

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No. 87-1271

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Richard J. Knapp, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska;
Martin Nusbaum, Director of Administrative Support of the Marine Highway System of the State of Alaska;
John Does II-X, Officers of the State of Alaska,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Eleanor Andrews, Commissioner of Administration of the State of Alaska; Richard Knapp, Commissioner of the Department of Transportation and Public Facilities of the State of Alaska; Martin Nusbaum, Director of Administrative Support of the Division of the Marine Highway Systems of the State of Alaska; *et al.*, respectfully request that the Court deny the petition for

writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 831 F.2d 843 (1987) and is reproduced in Appendix A of the petition.

STATEMENT OF THE CASE

This case concerns an Alaska Statute, AS 23.40.210, that causes the wages of Alaska Marine Highway System employees to be tied to the cost of living of the employees' residences. The purpose of the statute is to equalize the purchasing power of those wages and remove a disincentive to residing inside the state.

The material facts in this case are not disputed. The facts are stipulated in the parties' "Statement of Facts not in Dispute" (April 26, 1983), which is reproduced in Appendix D to the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners have challenged the constitutionality of Alaska Statute 23.40.210. The 1977 amendment to the statute requires that the salary of state employees account for the difference in the cost of living between employees residing inside and outside the state. Before the amendment, the only state employee collective bargaining agreements that did not contain cost of living differentials in their pay plans were those negotiated with the three

maritime unions, whose members are employed by the state on the Alaska Marine Highway System.[1]

I. The Ninth Circuit decision will have narrow application.

The amendment was designed to remedy a problem unique to Alaska. After the Alaska Supreme Court found unconstitutional an Alaska statute that established a durational residence requirement for employment by the state, *Alaska v. Wylie,* 516 P.2d 142 (Alaska 1973), two of the maritime unions with workers on the state owned ferry system pressed for a contract that would allow their members to reside in Seattle and report to work there. Through collective bargaining, the unions did obtain the right for regular crew changes in Seattle, one of the ports of call of the ferry system.

Employees on the southeast run of the ferry work in pairs and the collective bargaining agreements provided that the senior member of the pair select the change of port for the pair. As a result Alaska resident state workers could be required to report to work in Seattle.

In addition, the lower cost of living in Seattle discouraged residence in Alaska. Wages are generally higher in Alaska because the cost of living is higher in Alaska. For example, the state initially established wages for many, if not all, of its nonunion employees by developing a wage schedule comparable to that of the states of Washington, Oregon, and California for similar

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[1]The salary of nonunion state workers is set by statute that provides a pay differential depending upon the worker's residence. Alaska Statute 39.27.020 sets a six step pay decrease for nonresident state workers that amounts to about a 22.5 percent pay reduction.

work, and adding 25 percent to offset the higher cost of living in Alaska. The cost of living in Alaska cities is substantially higher, for example, than in the Seattle-Everett area.[2] While nonresident workers' pay is not equal to the pay of Alaska resident workers, the pay is apparently competitive where they do reside. Without the pay differential, a Seattle-based employee would be rewarded a premium for nonresidence.

A combination of the Seattle change of port, the great distance from Alaska to Seattle, the location of the IOMM&P and MEBA union locals in Seattle, and the lower cost of living in that area all worked to the advantage of residents of the Seattle area and to the disadvantage of Alaska residents. The amendment to Alaska Statute 23.40.210 was designed to remove the disincentives to Alaska residence.

The amendment affected only members of the maritime unions employed by the state, that is, the Alaska Marine Highway System employees. One of those unions and the nonresident members of another have brought this action.

Thus, the statute does not have broad application. It was designed to remedy a problem uniquely Alaskan that affects only Alaska state employees. The decision below will affect few others beyond the actual litigants in the case. The questions presented in the case are not suffici-

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[2]The petitioners have *not* argued that the 18-22 percent disparity in the wages between resident and nonresident Alaska Marine Highway System employees exceeds the difference in the cost of living between Alaska ports and Seattle, the home of most nonresident state Marine Highway System employees.

ently universal or important to warrant this Court's attention.

II. The only conflict with other circuit court decisions is unimportant.

Petitioners argue that the Ninth Circuit's holding under the commerce clause conflicts with decisions in the Third and Sixth Circuits. The Ninth Circuit held below that the dormant commerce clause does not create individual rights and that the district court lacked jurisdiction to consider petitioners' claim under that clause. The Ninth Circuit cited its previous decision in *White Mountain Apache Tribe v. Williams,* 810 F.2d 844, 849 (9th Cir. 1985), *cert. denied,* — U.S. —, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).

That case compared the commerce clause to the supremacy clause, noting that both clauses limit the power of the state to interfere in matters of national concern, and held that the commerce clause, like the supremacy clause, did not secure rights within the meaning of 42 U.S.C. Sec. 1983 and did not support an action under that section. The Ninth Circuit in *White Mountain Apache Tribe* examined and relied upon a line of authority culminating in the Eighth Circuit decision of *Consolidated Freightways Corp. of Delaware v. Kassel,* 730 F.2d 1139, 1144 (8th Cir. 1984), *cert. denied,* 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984), which found that the commerce clause did not create individual rights. The Ninth Circuit noted that other jurisdictions had found the dormant section of the commerce clause created individual rights but found their analysis unpersuasive.

The Ninth Circuit's position is completely consistent with its prior decisions and those of the Eighth Circuit, which this court has previously declined to review.

III. The Ninth Circuit correctly decided the issues below.

A. Commerce Clause

An alternate ground supports the Ninth Circuit's holding on the commerce clause. Even if the petitioners could invoke the commerce clause in support of their challenge to AS 23.40.210, the petitioners should not prevail under that clause.

The state is the employer of the Alaska Marine Highway System employees who brought this action. The commerce clause does not prohibit all interference with interstate commerce. It recognizes a market participant exception. The commerce clause permits state action as a market participant that might be impermissible under the clause if the state were acting in its sovereign capacity as a market regulator. In *White v. Massachusetts Council of Construction Employers,* 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), this Court found it permissible under the clause for the City of Boston to require contractors on city construction projects to hire only Boston residents for at least half of the jobs. The basis for the decision was the market participant exception to the clause.

The instant case provides an even stronger case for this exception. The ordinance in *White* had the effect of regulating the hiring practices of private employers, although limited to city funded construction projects. In contrast, the pay differential affects only employees of the state or of its political subdivisions. The provision has no downstream or regulatory effects.

Petitioners cite *W.C.M. Window Co., Inc. v. Bernardi,* 730 F.2d 486 (7th Cir. 1986), to the contrary. Petition, p. 15. The statute reviewed in that case was an Illinois hiring preference for state residents on public funded construction projects. The case is distinguishable because the employment relationship was not between workers and the state but rather between workers and construction contractors under contract with the state and its political subdivisions. The Illinois statute did have some downstream effect. However, respondents also question the Seventh Circuit's conclusion that imposing conditions on political subdivisions is "regulating" because political subdivisions are mere subdivisions of the state and have no authority independent of it.

Nothing in the record supports any downstream or regulatory impacts in this case. The pay differential in AS 23.40.210, therefore, presents a stronger case for the market participant exception to the commerce clause than the ordinance reviewed in *White* and is constitutional under that decision.

B. Privileges and Immunities Clause

The Ninth Circuit rejected petitioners' privileges and immunities clause challenge on the basis that a pay differential did not discourage or prevent the petitioners from pursuing employment with the state on the Alaska Marine Highway System. It also found that a statute designed to provide pay equity did not undermine the principles embodied in the clause. Because the statute did not interfere with interstate relations or the freedom to seek and obtain work in Alaska, the clause was not implicated. The Ninth Circuit relied primarily on analysis in *United*

Building and Construction Trades Council of Camden v. Camden, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).

Several alternate grounds exist for the holding under the privileges and immunities clause. This Court has never found, for example, that the interest in public employment is a fundamental one entitled to protection under the clause. This case can be distinguished from the cases cited by petitioners concerning private employment, which has been labeled a fundamental privilege protected under the clause. If, however, the Court were to find that public employment is a fundamental interest entitled to protection under the clause, the Court would still need to examine whether the statute was valid as a justifiable discrimination against that interest. *Camden,* 465 U.S. at 222, 104 S.Ct. at 1029 (privileges and immunities clause "does not preclude discrimination against citizens of other States where there is a 'substantial reason' for the difference in treatment"). Because the pay differential promotes important state concerns and is substantially related to those concerns, the discrimination, if any exists, is justified. *Id.*

C. Right to Travel

One of the individual petitioners claims that his right to migrate has been deterred by the pay differential. The Ninth Circuit rejected this claim because the interest in public employment is not a fundamental right or an essential benefit. As such, intensive scrutiny is not required and the statute need only be rationally related to its goal of attracting Alaska residents to work for the

Alaska Marine Highway System. The Ninth Circuit concluded that it was. Petitioners do not, however, suggest a basis for arguing that fundamental rights or essential benefits are at issue and a higher level of scrutiny is appropriate. They also do not argue that the statute is not reasonably related to its goals. The decision below is completely consistent with this Court's precedent under the right to travel and petitioners do not even suggest otherwise.

CONCLUSION

The statute challenged by petitioners corrects a problem caused by Alaska's unique geography and conditions. It removes a disincentive to living in Alaska by compensating for the disparity in the cost of living between Alaska-based and outside-based employees of the Alaska Marine Highway System. It does not operate as an economic barrier to work in Alaska nor does it penalize migration or travel. The statute does not interfere with any of the rights embodied in the privileges and immunities clause, the commerce clause, and the right to travel. The decision of the Ninth Circuit correctly decided these issues, consistent with case precedent. Moreover, the impact of the decision does not extend beyond the parties before the Court. The matter therefore is not sufficiently universal or important to justify this Court's consideration.

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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